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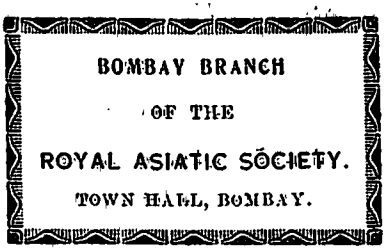

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LECTURES

ON

JURISPRUDENCE.

BEING THE SEQUEL TO

"THE PROVINCE OF JURISPRUDENCE DETERMINED."

TO WHICH ARE ADDED

NOTES AND FRAGMENTS.

78708

Now first published from the Original Manuscripts.

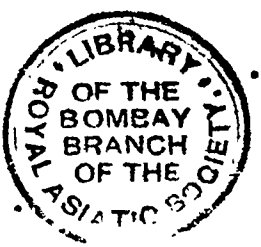
BY THE LATE

JOHN AUSTIN, Esq.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

N. 2-9

VOL. II.



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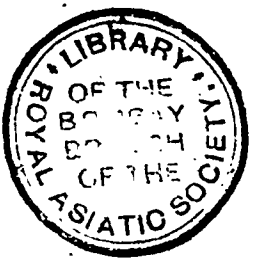


PREFACE.

In the preface to the Second Edition of the "Province of Jurisprudence determined," published two years ago, I stated what were the manuscripts remaining in my possession, in what condition they were left by Mr. Austin, and what were my intentions with regard to them. Since that time, I have been constantly occupied in preparing them for the press, and I now give them to the world under those conditions of incompleteness which I announced as inevitable.

It is unnecessary for me to repeat the reasons which determined me to undertake so arduous a work; or to apologize for the imperfect manner in which it is accomplished. I am now more than ever convinced that (however obvious the objections to it) this was the only safe and practicable mode of preserving these unfinished but precious materials in perfect genuineness and integrity.

I have not attempted to alter the form of the Lectures, nor to disguise the breaks and chasms in them.

In the Preface to the first volume (p. xxxiv.), I spoke of my intention of "collating the Course delivered at the Inner Temple with the earlier and more numerous lectures given at the London University, and inserting, as notes or appendix, any matter not found in these." Fortunately, the

task of selection and adaptation was not left to me. On a nearer examination, I found that the Author had marked with his own hand the parts of the Inner Temple Course which were to be added to, or substituted for, passages in the earlier lectures. In several places he had even cut out considerable portions from the latter, leaving a reference to the passages in the former which he intended to put in their place. I had therefore only to conform to a plan which, in this case, and I believe in this alone, was clearly and precisely marked out. The Lectures, as now printed, are, in fact, the two Courses, consolidated by himself.

A few typographical details seem to require notice.

There are some passages in the manuscript through which the author had drawn a light pencil line; not, I am sure, signifying that they were to be entirely rejected, (for what he meant to be erasures are too complete to admit of a doubt,) but that they were reserved for further consideration, or were to be transferred to some other place. These passages I have generally inserted, distinguishing them by brackets.

The references to books, which are extremely numerous, I have verified in every case, with the rare exception of such as were not within my reach. In some cases, where I have seen that Mr. Austin had emphatically marked the passage referred to, or had commented upon it in the margin of the book, I have quoted it. Perhaps this has been done rather too freely; but the space so occupied is not great, the books are not in everybody's hands, and I thought it might be convenient to the reader to see the precise passage to which the author referred. Wherever any words in these quotations are printed in italics, those words are underlined in the book.

With regard to the use of italics, capital letters, and other typographical distinctions, I am fully aware that there is a want of uniformity and consistency; and if, with my present experience, I had to begin my work again, there are several things which I should do otherwise. But the mass of papers was so great, the subjects treated of so difficult, and the task of arranging them so formidable, that it seemed as if a thorough and minute examination of their contents, and a mature deliberation on the details of their arrangement, would defer their publication almost indefinitely. A still more urgent motive arose from the consciousness that my own time for work cannot be long, and is extremely precarious; and the thought that I should leave these remains to a very uncertain fate, made me determine to secure the most important part of them from the chance of destruction, with as little delay as possible; a determination in which I was strengthened by those of my husband's friends who take the warmest interest in the advancement of the science, and in the fame of the writer.

The duties imposed on the guardians of a great reputation have been the subject of much discussion, and, to myself, of much painful deliberation. The only conclusion I could arrive at is this:—Where a writer has attached great value to form, and has regarded his writings as works of art; where any considerable portion of his reputation rests upon his genius and skill as an artist, it seems an act of injustice to his memory to publish anything which had not undergone the last and highest polish of his own hand.

But where the great aim of a writer has been to correct pernicious errors, to throw light upon obscure truths, to disseminate new ideas which he believed to be of the highest concernment to mankind; where the labour he bestowed

on style was bestowed solely with a view of expressing his thoughts with the greatest possible clearness and precision; where the depth, gravity and originality of the matter have a value far beyond that of any conceivable perfection of form, the materials he had accumulated with purposes so far transcending any personal ones, ought not, however unfinished, to be consigned to oblivion.

In subjecting what is most dear and venerable to me in the world, to so severe an ordeal, I would not be understood to be indifferent to form. But I have trusted confidently to qualities which no defects of form can destroy or greatly disguise. Moreover, these defects do not extend to what, in a scientific work, is of supreme importance; namely, *arrangement*. It will be apparent to the reader that, upon whatever new inquiry he entered, Mr. Austin's invariable method of proceeding was, first, to determine precisely its limits, and then to lay down in the most accurate manner the plan of arrangement to be pursued through the whole course of the investigation. And there are the clearest indications in the manuscripts themselves that this preliminary portion of his task was, in every case, most carefully and laboriously executed. Unfortunately, in many instances, the execution was carried no further; he never filled up the outline he had sketched with so masterly a hand. The notes on Criminal Law and those on Codification, for example, are in so rough and imperfect a state, that I should not have ventured to publish them, had I not been assured that they would, as models of arrangement, be of the utmost value to future inquirers.

It seems hardly necessary to repeat, (yet perhaps I cannot repeat too often) that this book shows not what the Author had done, but what he intended to do, and (in some

degree) what he was capable of doing. I have therefore allowed various indications of his intentions to remain. I have also preserved the traces of the questionings which continually suggested themselves to his penetrating and sincere mind; and with which he was careful to qualify and limit his assertions, so long as the shadow of a doubt remained. All these are characteristic of the spirit in which he pursued science. To seem to know, or to leap to prompt and facile conclusions, was impossible to him. To arrive at knowledge by ways the most laborious, the most mortifying to vanity, and the most irritating to impatience, was the course which the rectitude of his nature irresistibly impelled him to follow.

I had also a double motive in showing how many passages were reserved for reconsideration. These very marks of doubt, while they prove the caution with which *he* worked, and the process of investigation which was for ever going on in his mind, may perhaps suggest similar caution, and excite to similar mental contention in those who are to follow him. Every one of these doubts, pointing to further research and further reflection, may lead to the discovery of new truths or to the solution of unsolved problems. Such results would have been far more precious to him than any conceivable addition to his fame as a writer.

In the Preface to the first volume, I ventured to print a few disjointed sentences which appeared to me to throw light on the character of the man, and on the nature and aims of his teaching. I have since found more notes of the same kind; and, broken as they are, I give them, as showing still more clearly in what spirit and with what views he entered upon the duties of an office so new to the country and to himself as that of Professor of Jurisprudence.

What Lectures of this kind ought to be.

Great defects of those which I shall actually deliver: particularly as to the method and style:—having thought it better to gain (as far as I could) an extensive and accurate knowledge of my subject than—etc.

The research, necessary for this, extremely extensive;—should have gone on for ever.—New language,—(Illness and debility.)

In the course of a few years, shall be able to produce something more worth hearing.

Shall be obliged to omit much of what I had intended to embrace. There is none of the details which will not need as much illustration as the principal heads. (Lord Hale's illustration.) And if I descended far into the detail, the Lectures would be endless. I must therefore content myself with a general outline, descending here and there into the detail, so often as it is peculiarly interesting and important.

It is necessary to recollect that the terms, circumlocutions etc. used in these Lectures (so far as new) are merely explanatory. In applying any actual system, the terms of that system must be observed. So of its arrangements, etc., which are connected with its terms.

The principles of General Jurisprudence will not coincide with any actual system, but are intended to facilitate the acquisition of any, and to show their defects.

In the ordinary business of life, these systems must, of course, be applied as they are.

Reconciliation of divorce between Philosophy and Practice.

Will thank my hearers to attend at the conclusion of every Lecture, and to ply me with questions and demands for explanation. This will not only enable me to clear up obscurities, but to produce much of which I have read, and upon which I have thought, but which in solitary composition escapes the recollection.

Also to criticize with unsparing severity; for it is only by this that I can ever learn to accommodate my future Lectures to the wants of students.

Uses of this friendly intercourse, or "*amica collatio*:" particularly to young men writing. No time, that I shall not be willing to give. My heart in the subject: nor will anything be disagreeable, but the chilling indifference which I cannot help anticipating.

It will easily be understood that I have never entertained the project of rendering such a book acceptable to any but men seriously interested in the great questions of Law and Morals which lie at the foundation of human society. To the discriminating, and therefore indulgent, judgment of that narrow public which is constantly tending towards the ends my husband pursued, and through whom his labours (which to him seemed barren) may hereafter be rendered fruitful, I humbly and earnestly commend it.

I must add with gratitude, that my labour has been cheered by an ever-increasing expression of interest in it, from men eminent in Jurisprudence and in the moral sciences generally, in this and other countries;—strangers to all but the mind and character of the Author as displayed in his published book. They have exhorted me not to suffer myself to be deterred by want of completeness or by defects of style from giving to the world "any, the slightest intimations of Mr. Austin's opinions on the subjects to which he had devoted himself," or of his method of inquiry and arrangement. Such exhortations coming from men whose voice is authoritative, it seemed my duty to obey.

I am indebted to several gentlemen for encouragement, counsel and assistance: especially, I have to acknowledge the invaluable and persevering aid I have received from friends of Mr. Austin, who found time, in the midst of their own pressing avocations, to attend to my doubts and difficulties. Their sanction was peculiarly important; since they had been among the most assiduous and attentive hearers of Mr. Austin's Lectures, and were acquainted with his modes of thinking and expression. Without such a sanction, I should hardly have dared to publish matter in which, from the state of the manuscript, some exercise of discretion was inevitable.

It would be impertinent to affect to regard the care they have bestowed on the work in its passage through the press, as an obligation conferred on me. What they have done, has been done out of reverence for the memory of the Author, and zeal for the advancement of his science. Nor should I venture to make any public acknowledgment of it, did it not appear to me necessary for my own justification, and for the satisfaction of the reader.

SARAH AUSTIN.

Weybridge, April, 1863.

LECTURES ON JURISPRUDENCE.

LECTURE XII.

I HAVE endeavoured in the preceding Lectures, to accomplish the following objects: 1st, To determine the essentials of a *Law* (in the largest signification which can be given to the term *properly*): 2ndly, To distinguish the laws proper which are set by God to Man, and the laws proper and improper which are sanctioned or oblige *morally*, from the laws proper which are sanctioned or oblige *legally*, or are established directly or indirectly by *sovereign* authority.

Having attempted to determine generally the nature of Law, and to mark the boundaries of the field which is occupied by the science of Jurisprudence, I shall now endeavour to unfold (as briefly as I can) the essential properties of Rights: meaning by Rights, *legal* rights, or rights which are creatures of Law, strictly or simply so called.

Natural and Moral Rights, or Rights which are merely sanctioned religiously or morally.

There are, indeed, Rights which arise from other sources: namely, from the laws of God or Nature, and from laws which are sanctioned morally. But the peculiarities of these may be easily collected, by considering the peculiarities of the sources from which they flow. Accordingly, I shall not pause to examine them in a direct or formal manner, although I shall advert to them occasionally in the course of the en-

suing Lectures. At present, I dismiss them with the following remarks. 1st. Like the Obligations to which they correspond, natural and moral Rights (or rights which are merely sanctioned religiously or morally) are *imperfect*. In other words, they are not armed with the legal sanction, or cannot be enforced judicially. 2ndly, The Rights (if such they can be called) which are conferred by positive morality, partake of the nature of the source from which they emanate.—As positive morality consists of laws *improper*, so are the rights which are said to arise from it, rights *by way of analogy*.

For example, rights which are derived from the Law of Nations, are related to rights which are derived from positive Law, by a remote or faint resemblance. They are neither armed with the legal sanction, nor are they creatures of Law established by *determinate* superiors.

In attempting to explain the nature of a legal Right, I shall inevitably advert to the import of the following terms:

1st, Law, Duty and Sanction. For, though every law does not create a right, every right is the creature of Law. And, though every obligation and sanction does not imply a right, every right implies an obligation and a sanction.

2ndly, Person, Thing, Act and Forbearance. For rights are exercised by persons; or if not *exercised* by persons, *reside* in persons. And persons, things, acts and forbearances, are the *subjects* or *objects* of rights and obligations, or (changing the shape of the expression) are the *matter* about which they are conversant.

3rdly, Injury;—Wrong;—or Breach of Obligation or Duty by *com*mission or *o*mission. For as rights suppose or imply obligations and sanctions, so do obligations or sanctions suppose injuries or wrongs. In other words, their ends or purposes are the *prevention* of injuries or wrongs, and the *redress* of the damage or mischief which is commonly the consequence or effect.

4thly, Intention and Negligence. For every wrong

(whether it be positive or negative, or consist of a *com*mission or *o*mission) supposes intention or negligence on the part of the wrongdoer.

5thly, Will and Motive. For the import of the expressions "*will*" and "*motive*" is implied in the import of the expressions "*intention*" and "*negligence.*" And, further, obligation and sanction operate upon the *will* of the obliged, and are thereby distinguished from the *compulsion* or *restraint*, which, (for want of a better name) may be styled merely physical.

Finally, Political or Civil *Liberty*:—a term which, not unfrequently, is synonymous with *right*; but which often denotes simply *exemption from obligation*, conferred in a peculiar manner: namely by the indirect or circuitous process which is styled "*permission.*"

Having attempted to explain the import of the term "Right," and having touched upon the import of the terms which I have now enumerated, I shall advert to the ambiguities by which some of these expressions are obscured. I shall point particularly at the varying significations of "Law," "Right," and "Obligation." In attempting to unfold the notions which are signified by the term "Right," and to indicate the import of the terms with which it is inseparably connected, I shall scarcely find it possible to avoid repetition. For each of these expressions is so implicated with the rest, that the explication of any of them involves allusions to the others. For the same reason, the parts of the analysis will probably be obscure: though I hope that the whole may express the intended meaning, or, at least, may suggest it to the hearer.

Having briefly pointed at the purpose of the following analysis, and apologized for its repetitions and obscurities, I now proceed to the subject of it.

Obligations or Duties are positive or negative.

Every Law (properly so called) is an express or tacit, a direct or circuitous *Command.*

By every command, an *Obligation* is imposed upon the party to whom it is addressed or intimated. Or (changing the expression) it *obliges* the party by virtue of the corresponding sanction.

Every Obligation or Duty (terms, which, for the present, I consider as synonymous) is *positive* or *negative.* In other words, the party upon whom it is incumbent, is commanded to do or perform, or is commanded to forbear or abstain.

In order to the fulfilment of a positive obligation, the act or acts which are enjoined by the Command must be done or performed by, or on the part of, the obliged. In order to the fulfilment of a negative obligation, he must forbear from the act or acts which the Command prohibits or forbids. In the one case, the active intervention of the obliged is necessary. In the other case, the active intervention of the obliged is not only needless, but is inconsistent with the purpose of the obligation.

An obligation to deliver goods agreeably to a contract, to pay damages in satisfaction of a wrong, or to yield the possession of land in pursuance of a judicial order, is a positive obligation. An obligation to abstain from killing, from taking the goods of another without his consent, or from entering his land without his licence, is a negative obligation.

Forbearances cannot be styled with propriety *negative services.*

I observe that *forbearances* have been styled by Mr. Bentham* *negative services.* And, if we like, we may call them by that, or by any other name. But whether established language authorize the expressions seems to be doubtful. If you abstain from knocking me on the head, or from taking my purse, or from blackening my reputation, it can scarcely be said with propriety that "you render me a service." In ordinary lan-

* Traités de Législation, I. p. 154.

guage, "you forbear from doing me a mischief." It would seem that Mr. Bentham has transferred to the *object* of an obligation, an expression which applies correctly to the obligation itself. A forbearance, in pursuance of an obligation, is hardly a "negative *service*," though the obligation of which it is the object is properly a "negative *obligation*."

Obligations are relative or absolute.

Obligations may also be distinguished into *relative* and *absolute*.

A relative obligation is incumbent upon one party, and correlates with a right residing in another party. Changing the expression, A relative obligation corresponds or answers to a right; or implies, and is implied by, a right. Where an obligation is absolute, there is no right with which it correlates. There is no right to which it corresponds or answers. It neither implies, nor is implied by a right. Here, as elsewhere, the term "absolute" is a negative or privative expression. Here, as elsewhere, it denotes the *absence* of an object to which the speaker or writer expressly or tacitly refers.*

But, in order to the complete explanation of a negative or privative expression, we must first explain the object of which it denotes the absence. Consequently, I shall begin with rights, and with the obligations which are implied by rights; and I shall then proceed to the obligations which have *no* corresponding rights, or which (in a word) are *absolute*.

Rights imply *persons, things, acts,* and *forbearances*.

Since rights reside in *persons*, and since *persons, things, acts* and *forbearances* are the subjects or objects of rights, I must advert to the respective significations of these various related expressions, before I address myself to rights, and to the obligations with which they correlate.

Persons, natural or fictitious.

Persons are divisible into two classes:—physical or natural persons, and legal or fictitious persons.

* The positive obligations attaching on persons generally, are absolute.

In this instance, "*physical*" or "*natural*" bears the signification which is usually attached to it in the language of Jurisprudence, and, (I believe) in the language of other sciences. Its import is negative. It denotes a person not fictitious or legal, and is used to distinguish persons, properly so called, from persons which are such by a figment, and for the sake of brevity in discourse. Consequently, when we speak of "*persons*" simply, and without *opposing* them to legal or fictitious persons, we mean persons properly so called, or persons physical or natural.

Meaning of "physical person," or "person" simply.

By a physical or natural *person*, or, by a *person* simply, I mean *homo*, or a *man*, in the largest signification of the term: that is to say, as including *every* being which can be deemed *human*. This is the meaning which is given to the term person, in familiar discourse. And this, I believe, is the meaning which is given to it by the Roman Lawyers, (from whose writings it has been borrowed by modern jurists,) when they denote by it a physical or natural person, and not a legal or fictitious one.

Many of the modern Civilians have narrowed the import of the term person as meaning a physical or natural person. They define a person thus: "*homo*, cum *statu* suo consideratus:" a "human being, invested with a condition or *status*." And, in this definition, they use the term *status* in a restricted sense: As only including conditions which comprise *rights*; and as excluding conditions which are purely onerous or burthensome, or which consist of duties merely.

According, therefore, to this definition, human beings who have no rights, are not *persons*, but *things*. That is to say, They have no rights residing in themselves, but are merely the subjects of rights residing in others.

According to the Roman Law, down to the age of the Antonines, this was the position of the *slave*. In respect of his master, and also in respect of strangers, he was subject to Obligations or Duties. But he had no Rights as against his master, or even as against strangers. His master might

deal with him, as if he had been a *thing* of which his master was the owner:—might use, abuse, and even destroy him, without stint or measure, and with absolute impunity. In case he were killed or maltreated by a third party, the act was not a wrong against the slave himself, but was merely an offence against the dominion or property which resided in the master. In a word, the slave (like a thing) was susceptible of *damage*, but was not susceptible of *injury*. "Servo ipsi nulla injuria intelligitur fieri: sed domino *per eum* fieri videtur."*

Agreeably, then, to the definition which I am now considering, a *person* is a human being invested with *rights*. Or a *person* is a human being capable of *rights*.

* Gaii Institutionum Comment. Lib. I. § 20, et seq. At the passage indicated here, the following note is written in the margin:—

Slaves are ranked by Gaius amongst persons. If the *enjoyment of rights* be necessary to satisfy the term, a slave (in the earlier ages of Rome) was *not* a person, but a thing. If subjection to obligation suffices to constitute a person, a slave without rights belongs to the class of persons. In the age of Gaius, slaves were persons in every sense of the term; since, by certain Constitutions, they were protected for their own advantage, even against their masters. On the whole, 'a person' (to which 'condition' or 'status' is the corresponding abstract) seems to be susceptible of only two definitions: the narrower, a human being considered as enjoying or invested with Rights: the more extensive, a human being considered as subjected to Obligations. Men living without a government (*i.e.* without any common superior to which that term would apply) might be morally or religiously persons, but being subject to no obligations, and enjoying no rights *politically sanctioned*, would legally speaking be "*homines*" merely. —*Marginal Note.*

And again, at p. 295, Lib. III. § 220, *et seq.*, is the following:—

A slave (as the subject of property) may be damaged; but (as having no rights) is not himself susceptible of injury (Constitution of Antonine). The rights however which are there spoken of were given to the slave as against his master; and damage or even death inflicted upon the former by a third person may still have been considered as an injury done to the property of the latter. The Constitution, however, of Antonine seems to imply that the causeless killing of another's slave was already a *crime*; and, by consequence, that the slave was not without rights, even as against a stranger.—*Marginal Note.*

But this (I believe) is not the notion which was attached to the term "*person*" by the Roman Lawyers themselves, when they denoted by it a physical or natural person.

For, first, in all their divisions of persons, or in all their distributions of persons into various classes, slaves, who had no rights, are considered as *persons*, and "*persona*" and "*homo*" are synonymous or equivalent expressions. "Summa divisio de jure *personarum*, hæc est: quod omnes *homines* aut liberi sunt aut *servi*." Again: "Sequitur de jure *personarum* alia divisio. Nam quædam *personæ* sui juris sunt; quædam alieno juri subjectæ. [Sed earum *personarum* quæ alieno juri subjectæ sunt, aliæ in potestate, aliæ in manu, aliæ in mancipio sunt.] Et videamus nunc de iis quæ alieno juri subjectæ sunt: Ac prius dispiciamus de iis qui in alienâ potestate sunt. In potestate itaque sunt *servi* dominorum."

In these passages from the Institutes of Gaius (and in various corresponding passages in the Institutes and Digest of Justinian), slaves (who had no rights) are treated as a class of *persons*, and "*homo*" and "*persona*" are applied indifferently, or as if they were equivalent expressions. And, in penning these passages, the attention of the authors must have been particularly directed to the just legal import of the term "person." For the purpose with which they were occupied was the division of persons, or the distribution of persons into *genera* and *species*.

Secondly, Although the slave had no rights, there are numerous places in the Institutes of Gaius, in the Institutes of Justinian, and also in his Digest or Pandects, in which a *status* or condition is ascribed to the slave, or in which the slave is spoken of as bearing a *status* or condition.

Consequently, Admitting that the definition in question will apply to the term "*person*," and that a person is a human being bearing a condition or *status*, it will not follow that the term "*person*" is exclusively applicable to such human beings as are invested with *rights*.

Admitting *that* definition, and looking at the true import of the term *status*, the meaning of "*person*" is this: namely, a human being considered as *invested with rights*, or considered as *subject to duties*.*

But, according to the meaning which was attached to it by the Roman Lawyers, neither of the significations in question belongs to the term "*person*." They neither confined it to human beings, considered as invested with rights; nor did they even restrict it to human beings, considered as subject to obligations. The meaning which they attached to the term, is the familiar or vulgar meaning. With them "*persona*" denoted "*homo*," or *any* being which can be styled *human*.

[Taking the term in that meaning, it will not apply to men who are living in a state of nature, or who are not members of political societies. For men in that state have no legal rights, and are free from legal obligations. Nor will the term "*person*," taken in that meaning, apply to the monarch. For, as I endeavoured to demonstrate in a foregoing Lecture,† we cannot say with propriety that sovereigns have legal *rights*, or are subject to legal obligations. Obligations are imposed, and rights are conferred, by *laws*. He, therefore, who has rights, or he who lies under obligations, occupies a position wherein sovereigns are not. He is in a state of subjection, or in a habit of obedience, to some determinate superior from whom he receives the law.]

* Hugo, Lehrbuch der juristischen Encyclopädie, vol. i. c. 2. Mr. Austin's copy of this book is filled with marginal notes. The following is from the page referred to (*Servitut*):—

"Wherever a man has a right to the services of another, whether it be unlimited, as in the case of unqualified slavery; or limited, as the right of the husband in the wife, the right of the wife in the husband, etc., there is a combination of *Jus in Re* with *Jus ad Rem*; *jus in re*, as against other persons, *jus ad rem*, as against the person who is obliged to perform the services. All such rights belong to *Jura Personarum*: *i.e.* they suppose a *Status*.—*Marginal Note.*

† See Vol. I. p. 255.

The modern limitation of the term "*person*" to "*human beings considered as invested with rights,*" appears to have arisen thus: 1st, A *person* was defined by many of the modern Civilians, "a human being bearing a *status* or condition." 2ndly, The authors of the definition used the term "*status*" in a peculiar and narrow sense. They assumed that every *status* comprises *rights*; or, at least, comprises capacities to acquire or take rights. They assumed that a *status* or condition could not be ascribed to any one who was excluded from all rights, and was simply subject to duties. Now there is no classical authority for defining a person, "a human being bearing a *status* or condition." And further, I could cite numerous passages from the Classical Jurists, in which a *status* or condition is ascribed to the *slave:* That is to say, to a human being who is excluded from rights; and whose condition or *status* is therefore purely onerous, or consists of duties merely. The truth appears to be, that the authors of the definition considered the term "*status*" as equivalent to the term "*caput:*" As denoting certain conditions which *do* comprise rights; and comprise rights so numerous and important, that the conditions or *status* of which those rights are constituent parts, are marked and distinguished by a name importing pre-eminence.

For the purpose of ascertaining the meaning which should be assigned to the term *status*, I have searched the meanings which were annexed to it by the Roman Lawyers, through the Institutes of Gaius and Justinian, and through the more voluminous Digest of the latter. And the result at which I have arrived is this: that *status* and *caput* are not synonymous expressions, but that the term *caput* signifies certain conditions which are *capital* or principal: which cannot be acquired and cannot be lost, without a mighty and conspicuous change in the legal position of the party. Such, for instance, are the *status libertatis* and the *status civitatis:* that is to say, the condition of the freeman, as opposed to

the condition of the slave; and the condition of the citizen or member of the political society, as opposed to the condition of the foreigner.

Whatever may be the meanings of these terms as they are used by the Roman Lawyers, it is certain that they are not synonymous. For a condition or *status* is repeatedly ascribed to the slave, and yet it is affirmed of the slave "that he has *nullum caput.*"

[It is much to be wished, that the difference between them could be ascertained. For of all the perplexing questions which the science of Jurisprudence presents, the notion of *status* or *condition* is incomparably the most difficult. And much of the obscurity in which it is involved, arises from the manner in which it has been treated by the modern Commentators upon the Roman Law: Particularly from their habit of restricting the import of "*status,*" and of using it as if it were equivalent to the narrower expression "*caput.*"]

"Person" frequently synonymous with "status" or "condition."

I have hitherto considered the *extension* of the term "*person*" as denoting a human being. And in regard to the extension of the term, *as denoting a human being,* I believe that Classical Jurists, when they used it with that meaning, used it with the large signification which it bears in familiar discourse:—as being synonymous with "*homo,*" or as applying to every being which can be styled *human.*

But, instead of denoting *men* (or human *beings,*) it sometimes denotes the *conditions* or *status* with which men are invested. And, taking the term in this signification, every human being who has rights and duties bears a *number* of persons. "Unus homo sustinet *plures* personas." For example, every human being who has rights and duties, is *citizen* or *foreigner:* that is to say, he is either a member of a *given* independent society, or he is not a member of that given independent society. He is also a *son.* Probably, he is *husband* and *father.* It may happen,

moreover, that he is *guardian* or *tutor*. His *profession* or *calling* may give him distinctive rights, or may subject him to distinctive duties. And with the various conditions or *status* of citizen, son, husband, father, guardian, advocate, attorney or trader, he may combine the condition of judge, or of member of the supreme legislature.

The term "*person*," as denoting a condition or *status*, is therefore equivalent to *character*. It signified originally, a mask worn by a player, and distinguishing the character which he represented from the other characters in the piece. From the mask which expressed the character, it was extended to the character itself. From characters represented by players, or from dramatic characters, it was further extended by a metaphor to conditions or *status*. For men, as subjects of law, are distinguished by their respective *conditions*; just as players, performing a play, are distinguished by the several *persons* which they respectively enact or sustain.

The term "*person*" has, therefore, two meanings, which must be carefully distinguished. It denotes a *man* or *human being*; or it signifies some *condition* borne by a man. A person (as meaning a man) is one or individual: But a *single* or *individual* person (meaning a man) may sustain a *number* of persons (meaning conditions or status). The erroneous definition of a *person* to which I have already adverted, probably arose in part from a confusion of these significations. Every *status* or condition consists of rights or duties; or it consists of both. And if we impute to a person (as meaning a *man*) this essential of a person (as meaning a *condition*), it will follow that a person (as meaning a man) must be defined thus: A man invested with rights, or subject to obligations.

The further limitation of the term "*person*" to "a man *invested with rights*," probably arose (as I intimated before) from an erroneous limitation of the term "*status*:" from the restriction of the term to certain *capital* conditions, which

consist of *rights* as well as of duties, and are mainly distinguished by the rights entering into their constitution or composition: In a word, from the confusion of *status* (the larger or generic expression) with *caput* (the narrower or specific).

[If *persona* (as meaning *man*) be equivalent to *homo*, and be not exclusively applicable to "men *invested with rights*," it follows that the slave is a *person*, though he be excluded from rights. If, indeed, we consider him from a certain aspect, we may, in a certain sense, style him a *thing*. But almost every person may be considered from a similar aspect, and may also be styled a *thing*, with equal propriety. As I shall shew more fully when I get further on, persons must be considered from three points of view: As invested with rights; as lying under obligations or duties; and as being the subjects or objects of rights and obligations.]

I think, then, that I am justified by authority, as well as by the convenience which results from it, in imputing to the term *person* (as denoting a physical or natural person) the familiar or vulgar meaning; or in considering a physical or natural *person* as exactly equivalent to "man" (in the largest signification of the term).

Fictitious or legal persons. Fictitious or legal persons are of three kinds: 1st, Some are collections or aggregates of physical persons: 2ndly, others are *things* in the proper signification of the term: 3rdly, others are collections or aggregates of rights and duties. The *collegia* of the Roman Law, and the corporations aggregate of the English, are instances of the first: the *prædium dominans* and *serviens* of the Roman Law, is an instance of the second: a *status* or condition, is an instance of the third.

It is impossible that I should enter here upon the consideration of legal persons. For their natures are various; the ideas which they stand for are extremely complex; and they, therefore, belong to the detail, rather than to the *gene-*

ralia of the science. At present I will merely remark that they are persons by a figment, and for the sake of brevity in discourse. All rights reside in, and all duties are incumbent upon, physical or natural persons. But by ascribing them to feigned persons, and not to the physical persons whom they in truth concern, we are frequently able to abridge our descriptions of them.

To take the easiest instance; this is the case with the *prædium dominans* and *serviens* of the Roman Law. A *servitus* or easement over a given *prædium* resides in every person who occupies another *prædium*: meaning by a *prædium* a given piece of land, or a given building with the land on which it is erected. The servitude or easement in question (as, for instance, a right of way), is ascribed, by a fiction, to one of these *prædia*; and, by a similar fiction, an obligation or duty to bear the exercise of the servitude is imputed to the other. The first is styled *dominans*; the latter *serviens*. Or (as we should say in English Law-language) the *jus servitutis* or easement is appurtenant to lands or messuages. In truth, the right resides in every physical person who successively owns or occupies the *prædium* styled *dominans*. And the right avails against every physical person who successively owns or occupies the *prædium* styled *serviens*. But by imputing these rights and obligations to the *prædia* themselves, and by talking of them as if they were persons, we express the rights and duties of the persons who are really concerned, with greater conciseness.

* Blackstone, vol. i. p. 383.

Fragments.

*Law is imperative or permissive:**

Law, considered as a rule of conduct prescribed by the Legislator or Judge, is necessarily imperative, since it imposes an obligation to act or to refrain from acting in a given manner.†

As conferring a right, it is permissive. Considered as an expression of the will of the Legislator or Judge, it is imperative *or* permissive. For it may consist in the removal of restraint.

Penal Laws are seldom directly imperative.

Sanction is not of the essence of permissive law. For, by such a law, an obligation, instead of being imposed, may be simply removed. (*Sed quære.*)

It has hitherto been assumed that every law imposes an Obligation. Apparent exception in the case of Permissive Laws. The exception *only* apparent. Taking off an Obligation, it confers a Right, and so imposes an Obligation corresponding to that right.

With reference to such parts of conduct as the positive law of the community does not touch, the members of a political society are in a state of nature. (*Sed quære:* For they are protected in that liberty by the State. Such liberty would seem to consist of rights conferred in the way of permission.)

Law is absolute or conditional;—is to take effect at all events, or only in default of dispositions by the interested parties.

Liberty.

Freedom, Liberty, are negative names, denoting the absence of Restraint.

* Bentham, "Principles," etc., pp. 221, 328-9. Blackstone, 86. Thibaut, System.

† "Insofern wir unter Gesetzen, die *von der Staatsgewalt* den Unterthanen *vorgeschriebenen* Regeln verstehen, ist es einleuchtend, dass es in diesem Sinne nur *gebietende* und *verbietende* Gesetze, aber keineswegs *erlaubende* Gesetze geben kann. Denn in Beziehung auf die erlaubten Handlungen bedarf es keiner besondern Bestimmung, da aus dem Inhalte der Gebote oder Verbote unmittelbar gefolgert werden kann, was erlaubt ist," etc. etc.—*Falck, Jurist. Encyc.*, p. 31.

If by Laws be meant, *obligatory* or *sanctioned* Rules, Laws are either *imperative* (commanding something which shall be done), or prohibitive (commanding something which shall not be done), but cannot be *permissive.—Marginal note.*

Civil, Political, or Legal Liberty, is the absence of Legal Restraint, whether such restraint has never been imposed, or, having been imposed, has been withdrawn.

It is general or particular: *i. e.* it extends to all; or it is granted to one or some, by an exemption or *privilegium* (see *post*, "Privilege").

Liberty and Right are synonymous; since the liberty of acting according to one's will would be altogether illusory if it were not protected from obstruction. There is however this difference between the terms. In Liberty, the prominent or leading idea is, the absence of legal restraint; whilst the security or protection for the enjoyment of that liberty is the secondary idea. Right, on the other hand, *de*notes the protection and *con*notes the absence of Restraint.*

If the protection afforded by the Law be considered as afforded against private persons, the word Right is commonly employed. If against the Government, or rather against some member of the Government, Liberty is more frequently used: *e. g.* the Liberties of Englishmen.† Liberty and Right are not however always coextensive, since the security for the enjoyment of the former may in part be left to the moral and religious sanctions.

(*Sed quære.*) Whether Liberty can ever mean anything but the right to dispose of one's person at pleasure? Liberty or Freedom to deal with an external subject seems, however, to be equivalent to "Right to deal with it."

* "Par rapport aux actions sur lesquelles le Législateur ne prononce ni défense ni injonction, il ne crée aucun délit, aucune obligation, aucun service; *cependant il vous confère un certain droit*, celui de *faire* ou de *ne pas faire*, selon *votre propre volonté*."—*Traités de Lég.*, vol. i. p. 156.

The right of doing that which is not prohibited, supposes an obligation on others not to obstruct. See "Principles," etc., p. 222.—*Marginal Note.*

"On peut imposer des obligations sans qu'il en résulte des droits; mais on ne peut pas créer des droits qu'ils ne soient fondés sur des obligations. Comment me confère-t-on un *droit* de propriété sur un terrain? C'est en imposant à tous les autres l'obligation de ne pas toucher à ses produits. Comment ai-je le *droit* d'aller et venir dans toutes les rues d'une ville? C'est qu'il n'existe point d'obligation qui m'en empêche."—*Traités, etc.*

And there *does* exist an obligation on others to refrain from obstructing me.—*Marginal Note.*

† For Liberty, as meaning share in Sovereignty, see Kant, "Zum ewigen Frieden." See also, 'Province,' etc.; at the end.

On the whole, Right and Liberty seem to be synonymous;—either of them meaning, 1st, permission on the part of the Sovereign to dispose of one's person or of any external subject (subject to restrictions, of course); 2nd, security against others for the exercise of such right and liberty.

Wherever there is protection afforded, *Right* is the proper word. As against the Sovereign, there can be no right (see Government and Sovereign).

Physical freedom is the absence of external obstacles; *i. e.* the absence of causes which operate independently of the will (see Sanction). Moral freedom is the absence of motives of the painful sort.

LECTURE XIII.

In my last Lecture, I distinguished Obligations or Duties into *positive* and *negative;* and indicated generally and briefly the nature of that important distinction.

I also distinguished Obligations into *relative* and *absolute:* that is to say, obligations which correlate with, or correspond or answer to *rights;* and obligations which neither imply, nor are implied by, *rights.* And, for the reason which I then assigned, I began with the analysis of rights (and of the obligations implied by rights); and deferred all further remark upon the nature of absolute obligations, till that analysis should be completed.

But, since rights reside in persons, and since *persons, things, acts,* and *forbearances* are the subjects or objects of rights, it was necessary that I should advert to the significations of those several related expressions, before I could address myself to rights and to the obligations with which they correlate.

Accordingly, I distinguished persons into physical or natural, and legal or fictitious: that is to say, into *persons,* properly and simply so called; and persons which are such by a fiction, and for the sake of brevity in discourse.

I then stated the meaning which I attach to the term "person," as signifying *a physical or individual person.* I endeavoured to demonstrate, that the extensive meaning which I attach to the term, coincides with the meaning which was annexed to it by the Roman Lawyers. And I distinguished that meaning from another and a very diffe-

rent meaning in which they frequently employ it: namely, *not* as signifying physical or individual persons, but as signifying the conditions or *status* which are borne or sustained by the former.

In conclusion, I enumerated the kinds of persons which are persons by virtue of fictions; and I also pointed at the design which those fictions are intended to answer. But inasmuch as fictitious persons are of widely differing natures, and inasmuch as the ideas which they denote are for the most part extremely complex, I deferred all further consideration of them till I should descend to the detail of the science.

Having considered the import of *person*, I proceed to the significations of *Thing*, *Act* and *Forbearance*.

Things are such *permanent* objects, *not being persons*, as are sensible or perceptible through the senses. Or (changing the expression) things are such *permanent* external objects as are *not persons*. Such (for example) is a field, a house, a horse, a garment, a piece of coined gold. Such is a quantity of coined or uncoined gold, determined or ascertained by number or weight. Such is a *quantity* of cloth, corn, or wine, determined or ascertained by measure.

Things are opposed, on the one hand, to *persons* themselves; and are contradistinguished, on the other, from the *acts* of the persons, and from the rest of the *transient* objects which are denominated *facts* or *events*.

Things resemble persons in this: That they are permanent external objects; or objects which are permanent, and sensible or perceptible through the senses. They differ from persons in this: That *Persons* are invested with rights and subject to obligations, or, at least, are capable of both: *Things* are essentially incapable of rights or obligations; although (by a fiction) they are sometimes considered as persons, and rights or obligations are ascribed or imputed to them accordingly.

They resemble facts or events in this: That they are incapable of rights or obligations. They differ from facts or events in this: That things are *permanent* external objects; whilst facts or events are *transient* objects, and consist of determinations of the will, with other affections of the mind; as well as of objects perceptible through the senses.

In drawing the line, by which Persons and Things are separated from Events, I content myself with vague expressions, and am far from aspiring to metaphysical precision. If I attempted to describe the boundary with metaphysical precision, I should run into inquiries which my limits imperiously forbid, and which were scarcely consistent with the purpose of these discourses. If I endeavoured to define exactly the meaning of "permanent object," I should enter upon the perplexing question of sameness or identity. If I endeavoured to define exactly the meaning of "sensible object," I should enter upon the interminable question about the difference between mind and matter, or percipient and perceived. And, in either case, I should thrust a treatise upon Intellectual Philosophy into a series of discourses upon Jurisprudence.

Accordingly, now that I have indicated rather than determined the boundary, I must leave my hearers to settle it for themselves, according to their own fashion. I must leave them to distinguish, after their own fashion, between objects which are perceptible through the senses, and objects which are not; between sensible objects which are permanent, and are *things* (strictly so called), and sensible objects which are transient, and are ranked with *facts* or *events*. The discretion which prompts my reserve will be understood by those who have turned a portion of their attention to the Philosophy of the Human Mind, and will meet with approbation rather than censure. Those who are ignorant of what is styled Metaphysic frequently run, without knowing it, into ill-timed metaphysical speculation. Those who are versed in Metaphysic, know the occasions for abstain-

ing from it, as well as the occasions on which it can be applied to advantage.

But, in order that we may keep clear of a very perplexing ambiguity, I will remark for a moment upon two distinct significations of "permanent" and "transient." And this remark I am compelled to interpose, inasmuch as it regards a distinction which strictly belongs to *Jurisprudence*, whether it be metaphysical or not.

Sensible objects, or objects perceptible through the senses, are permanent or transient. The former are persons or things; the latter rank with the objects which are denominated facts or events.

Now when it denotes a *thing*, as contradistinguished from an *event*, the import of the expression "*permanent* sensible object," is (I think) this: It denotes an object which is perceptible *repeatedly*, and which is considered by those who repeatedly perceive it, as being (on those several occasions) one and the same object. Thus, the horse or the house of today is the horse or house of yesterday; in spite of the intervening changes which its appearance may have undergone.

The *transient* sensible objects which rank with facts or events, are *not* perceptible repeatedly. They exist for a moment: disappear: and never recur to the sense, although they may be recalled by the memory. Such (I think) is the distinction (indicated in very general expressions) between the term "*permanent*," as applied to *things*, and the term "*transient*" as applied to sensible *events*. And, taking the terms in these significations, all *things* are *permanent*, and no *things* are *transient*.

But, taking the terms in other significations, things may be distinguished into *permanent* and *transient*, or into such as are more permanent and such as are less permanent. For some are more enduring; others are less enduring. In other words, some retain the forms which give them their actual names for a longer period: some retain those

forms for a shorter period, or corrupt, decay, and perish, *speedily*.

The purpose of this distinction will appear clearly, when I consider the kinds and sorts into which things are divisible: especially the *kind* of things which have been styled *fungible*, and the *sort* of fungible things *quæ usu consumuntur*.

Resuming the definition of a thing, I mean by a *thing* (as contradistinguished from an *event*), any permanent external object *not* a person. Or (changing the expression) I mean by a thing (as contradistinguished from an event), any sensible object, not being a person, which is capable of being perceived *repeatedly*, or is capable of *recurring* to the sense.

Distinctions between Things.

The distinctions between Things, or the various *genera* and *species* under which they are distributed, will be considered hereafter. For, though these distinctions are derived (in part) from the physical differences between things, they are also derived (in part) from the differences between rights and obligations; and are just as factitious, or as completely the work of Law, as the rights and obligations of which things are the subjects. Consequently, a statement of the distinctions between Things (as subjects of the science of Jurisprudence) must be preceded by a general statement of the distinctions between rights and duties.

From the import of the term *thing* (as opposed to *person* and *event*) I proceed to certain ambiguities by which it is perplexed and obscured.

Things as signifying acts and forbearances.

And, first, "*res*" or *thing* (as used by the Roman Lawyers) is frequently extended from *things* (strictly so called) to *acts* and *forbearances* considered from a particular aspect: namely, considered as the objects of obligations, and of the rights corresponding to obligations. For example, If you are bound by virtue of a contract to *do* certain acts (as to perform work and labour

in repairing a house); or if you are bound by virtue of a contract to *forbear* from certain acts (as to forbear from exercising a trade within certain limits), the acts or forbearances to which *you* are *obliged*, and to which the opposite party has a correlating or corresponding *right*, are *res* or *things* (in the sense which I am now considering). Strictly speaking, the act or forbearance is not a *thing*. It is not a permanent external object. Strictly speaking, it is the object or end of the right, and of the obligation which corresponds to the right; or it is the purpose for the accomplishment of which the right and the obligation exist.

Corporeal and Incorporeal Things.

A more remarkable and a more perplexing ambiguity, is the following.

Things are divided by the Roman Lawyers into corporeal and incorporeal.

Under *corporeal* things are included,

1st, *Things* (strictly so called:) that is to say, permanent external objects *not* persons. 2dly, *Persons*, as considered from an aspect to which I shall advert immediately: that is to say, not as having rights, or as being bound by obligations, but as the subjects or objects of rights and obligations residing in, or incumbent upon others. 3dly, Acts and Forbearances, considered from the aspect to which I have alluded already: that is to say, as the objects of rights and obligations.

By "*incorporeal things*," they understood not the subjects of rights and obligations, but rights and obligations themselves: "Ea quæ *in jure* consistunt:" velut "*jus* hereditatis," "*jus* utendi fruendi," "*jus* servitutis," "*obligationes*, quoquo modo contractæ."

By "*corporeal*" they meant sensible, or perceptible through the senses: Or (in that philosophical jargon which they borrowed from the Greeks) they meant by "corporeal," tangible. For, in the language of the Stoics, and also of the Epicureans, all the various senses were considered as

organs of touch; or all sensations, as modifications of the sensation of touch.*

And taking "corporeal" and "tangible" in that sense, *res corporales*, or *res quæ tangi possunt*, will not only comprise *things* (in the strict signification of the term), but also *acts* (as the objects of rights and obligations). For every act which can be the object of a right or obligation, is an act *external*, or *perceptible by sense*. To forbearances, indeed, the term *res corporales* will not apply strictly. For all forbearances are mere determinations of the will. But it was probably extended to forbearances which are the objects of rights and obligations, partly for the sake of convenience, and partly because the acts to be forborne are tangible or sensible.

In the language, then, of the Roman Lawyers, the term *res* has two significations which are widely different. 1st, It denotes Things, Acts and Forbearances, as the subjects or objects of rights and obligations, and it sometimes denotes persons considered from that same aspect. 2dly, It denotes Rights and Obligations themselves.

In the English Law, we have this same jargon about "incorporeal things,"† (derived from the Stoical Philosophy through the Roman Law), applied less extensively. With us, *all* rights and obligations are not *incorporeal things;* but certain rights are styled *incorporeal hereditaments*, and

> "Pondus uti saxis, calor ignibus, liquor aquai
> Tactus corporibus cunctis, intactus Inani."
>
> "Tactus enim, Tactus, proh Divum numina sancta!
> Corporis est sensus, vel cum res extera sese
> Insinuat, vel cum lædit, quæ in corpore nata est."
>
> *Lucretius, Lib.* I. & II.

† Blackstone, Vol. II. c. 3.

The "Incorporeal Hereditaments" of the English Law are not exactly equivalent to the "Res incorporales" of the Roman. The difference is occasioned by the difference in the English law between the descent or devolution of moveables and immoveables; including in the first, *jura ad rem*, or most of them. *Hereditas* or *obligatio* = an incorporeal (not here-

are opposed by that name to *hereditaments corporeal*. That is to say, *rights* of a certain species, or rather of numerous and very different species, are absurdly opposed to the *things* (strictly so called) which are the *subjects* or *matter* of rights of another species.

I observed, in my last Lecture, that the slave is styled by the Roman Lawyers a "person." And considered as bearing a condition, and as bound by obligations, he is a person. But considered as the subject of the *dominion* which resides in the master (a right which the master can assert against the rest of the world), he is sometimes styled a *thing*. For example, In case he be unjustly detained by a third party, the master may recover him by that peculiar action which is styled *rei vindicatio*: an action which was confined to the recovery of *things*; and which could not be brought by the father for the purpose of recovering his son, although the *patria potestas* (or right of the father in the son) was closely analogous to the dominion of the master.

This is utterly capricious. For, if the slave is a thing (as the subject of the master's right), so should every person be considered as a thing, where he is the subject of a right residing in another. In this sense, almost every person is a thing. For there is scarcely a person who is not the subject of a right, which resides in another person, and avails against the world at large. There are, however, very few cases, in which the slave is styled a thing (even when he is considered as the *subject* of the master's dominion). Generally speaking, he is styled *homo*, or *servilis persona* (even when considered under that aspect): As, for instance, when he is considered as the subject of a *mancipation*, or of a peculiar assignment or conveyance.

ditament, for they devolve not upon *heirs*, but) incorporeal thing, going to executors or administrators, or to those who are entitled to that office. —*Marginal note in the page referred to.*

And, lower down (same page): Like "property," (the more extensive right,) it is a collective name; and, by consequence, has no *one* thing or incident corresponding to it.—*Marginal note.*

LECTURE XIV.

In the last Lecture, I entered upon the analysis of the term "Right."

But, since rights reside in *persons*, and since *persons*, *things*, *acts* and *forbearances* are the subjects or objects of rights, it was necessary that I should advert to the meaning of those several related expressions, before I could address myself *immediately* to rights and their corresponding duties.

Accordingly, In the last Lecture, I considered the term "Person," and the term "Thing."

In the present Lecture I shall point at the respective significations of "Act" and "Forbearance," and shall consider briefly an important distinction which obtains between rights themselves:—A distinction of which we must seize the general scope or import, before we can understand, and can express adequately and correctly; that nature or essence which is common to *all* rights.

Persons and Things.

Persons and Things are objects *external* and *permanent*. Or, persons and things may be distinguished from other objects, in the following manner.

1st, A person or thing is a sensible object, or an object perceptible by sense.

2dly, A person or thing is perceptible *repeatedly*, or is capable of *recurring* to the sense. 3dly, A person or thing recurring to the sense, is considered by him who repeatedly perceives it, as being, on those several occasions, *one* and the *same* object.

Things are such permanent external objects as are *not* Persons: that is to say, as are not physical or individual persons: as are not men (in the largest signification of the term): or (using the term "men" in its narrower import) as are not men, women or children. Persons and Things distinguished.

Facts, Events, or *Incidents* may be distinguished from Persons and Things in the following manner. 1st, Every person or thing is a *sensible* object. Of events, *some* are perceptible by sense; but *some* are determinations of the will, or other affections of the mind. Events.

2dly, Every person or thing is a *permanent* sensible object. But an event perceptible by sense (like every other event) is *transient.* That is to say, an event perceptible by sense, is not perceptible *repeatedly.* It exists for a moment: Then, ceases to exist: And *never recurs* to the sense, although the memory may recall it.

Events are simple, single, or individual; or they are complex. A simple event is incapable of analysis; or is considered incapable of analysis. A complex event is a number of simple events, marked (for the sake of brevity) by a collective name. The importance of this distinction will appear clearly, when I consider events more in detail: especially, when I consider them as *causes* of rights and duties, and of the *termination* of rights and duties. Events are simple or complex.

Before I proceed to the terms "Act" and "Forbearance," I will offer a brief remark upon the terms which are now in question. Import of "fact" and "incident."

The terms "fact" and "incident" are sometimes synonymous with the term "event." But, not unfrequently, "fact" is restricted to human acts and forbearances, and "incident" employed in a sense to which I shall advert hereafter. Consequently, the objects which I am endeavouring to distinguish from persons and things, are best denoted by the term "events." "Event" is adequate and unambiguous: It will always apply to *any* of the objects in question. "Fact" and "incident" are ambiguous. Taken

in one signification, each of them will apply to *any* of the objects in question. Taken in another signification, it applies exclusively to events *of a class.*

Acts and Forbearances. The only class of events to which I advert at present, are *human acts and forbearances.*

Act. Now human acts or actions, are internal or external. In other words, they are *not* perceptible by sense, or they *are* perceptible by sense. Internal acts are determinations of the will. External acts are such motions of the body as are *consequent upon determinations of the will.* Determinations of the will, and such motions of the body as are consequent upon determinations of the will, are (I conceive) the only objects to which the term "act" can be applied with propriety. It is scarcely applicable to those motions of the body which are *involuntary:* that is to say, which are involuntary (in the large acceptation of the term), or are *not* consequent upon determinations of the will. If (for example) you plunged into the water *purposely,* the motions of your body *consequent upon the act of your will* would be considered an *act,* or a series of acts. But if you fell into the water without design, the descent of your body into the water would hardly be styled an *act,* although it would be called an *event.*

Nor is the term "act" applicable to those affections of the mind which are frequently styled passive: that is to say, which are *not* determinations of the will. Whether it will apply *to these,* without a solecism, seems to be doubtful. But we certainly read and hear of "*acts* of the will;" and I think that the term may be extended to determinations of the will, consistently with general usage. At all events, I shall take leave to consider them as belonging to the class of *acts:* styling them, by way of distinction, "acts *of the will,*" or "acts *internal.*"

Forbearance. A Forbearance is a determination of the will, *not* to do some given external act. Or (taking the notions which the term includes in a different order) a forbearance

is the *not* doing some given external act, and the *not* doing it *in consequence of a determination of the will.* The import of the term, is, therefore, double. As denoting the determination of the will, its import is *positive.* As denoting the inaction which is consequent upon that determination, its import is *negative.*

Its import should be marked and remembered. For mere inaction imports much less, than *forbearance* or abstinence from action.

In popular and loose language, a *culpable* forbearance (or a forbearance which is a violation of some law or rule) is not styled a "forbearance," but is ranked with omissions. But an omission (properly so called) is widely different from a culpable forbearance. A culpable forbearance is an act of the will, or supposes an act of the will. An omission is not the consequence of an act of the will, but of that state of the mind which is styled "negligence," and implies the *absence* of will and intention. Accordingly, I apply the term "forbearance" to all *voluntary* inaction, or to all inaction which is consequent upon volition. Those forbearances which are violations of laws or rules, may be styled, by way of distinction, unlawful, unjust, or culpable.

And here I dismiss for the present the terms "Act" and "Forbearance." Before we can settle the import of these expressions, we must settle the import of the term "Will," and of the inseparably connected term "Intention." But these I shall consider (in conjunction with "Negligence" and "Rashness") when I endeavour to determine the nature of "Injuries" and "Sanctions;" and to distinguish the compulsion and restraint which are styled "Obligation," from the compulsion and restraint which operate not upon the will, and may be styled "merely physical."

Introduction to the Distinction between *jus in rem* and *jus in personam.*

From Persons, Things, Acts and Forbearances, I proceed to analyze, in a general and concise manner, an important distinction which obtains between Rights, and between the duties or obliga-

tions which are implied by rights. But in order that you may follow this analysis with greater ease, I introduce it with the following assumptions, and with the following explanatory remarks. The truth of the assumptions will be proved hereafter. I introduce them here, for the purpose of facilitating apprehension.

1st, External Acts and Forbearances (or, briefly, Acts and Forbearances) are the *objects* of duties. Changing the expression, the ends or purposes for which duties are imposed, are these: that the parties obliged may do or perform *acts*, or may forbear or abstain from *acts*. The acts or forbearances to which the obliged are bound, I style the *objects* of duties.

2dly, The objects of *relative duties*, or of duties which answer to rights, may also be styled the *objects* of the *rights* in which those duties are implied. In other words, all rights reside in persons, and are rights to acts or forbearances on the part of *other* persons. Considered as corresponding to duties, or as being rights to *acts* or *forbearances*, rights may be said to avail *against* persons. Or, changing the expression, they are capable of being enforced judicially *against* the persons who are bound to those acts or forbearances.

3dly, Of Rights, *some* are rights *over* things or persons, or *in* or *to* things or persons. *Others* are *not* rights over things or persons, or in or to things or persons. All rights over things or persons, are of that class of rights which avail against persons generally, or (in other words) which avail against the world at large.

Of rights which are *not* rights over things or persons, *some* are of the class of rights which avail against persons generally. *Others* avail exclusively against persons certain or determinate, or against persons who are determined individually.

Where a right is a right over a thing, or (changing the shape of the expression) *in* or *to* a thing, I style the thing

over which it exists the *subject* or *matter* of the right. I thus distinguish it from acts and forbearances, considered as the *objects* of rights.

Where a right is a right over a person, I also style the person over whom it exists the *subject* of the right. For, a person, considered from this aspect, is placed in a position resembling the position of a *thing* which is the subject or matter of a right. Considered from this aspect, he is not considered as invested with rights, nor is he considered as lying under duties or obligations. He is considered as the subject of a right which resides in *another* person, and which answers to duties or obligations incumbent upon *third* persons.

For example, the relation of master and servant implies *two* rights which are utterly distinct and disparate. The master has a right, which avails against the servant specially, to acts and forbearances on the part of the servant himself. The master has also a right *over* or *in* the servant, which avails against other persons generally, or against the world at large. With respect to the first of these rights, the servant lies under obligations answering to the right of the master. But with respect to the second of these rights, he is placed in a position resembling the position of a *thing* which is the subject or matter of a right. With respect to *that* right, he lies under no obligations. He is merely the subject of a right which resides in his master, and which avails (*not* against *himself*) but against *third* persons.

To resume:

All rights reside in persons, and are rights to acts or forbearances on the part of other persons. And acts and forbearances, considered from this aspect, I would style the *objects* of rights, and of the corresponding duties or obligations. But *some* rights are rights over persons or things: Or (changing the shape of the expression) they are rights *in* or *to* persons or things. And persons and things, considered

from this aspect, I would style the *subjects* of those rights, and of the duties which answer to those rights.

And here I will briefly remark, that the term "*subject*," as applied to a *person*, is somewhat ambiguous. A person is subject *to* a duty, when he is bound by the duty, or the duty is incumbent upon him. He is *the* subject *of* a duty, when the duty is not incumbent upon himself, but he is merely *that* about which the duty is conversant. To recur to the example which I have just cited: As between himself and his master, the servant is *subject to* a duty: that is to say, a duty is incumbent upon him. But he is *the* subject *of* the duty which is incumbent upon *third persons* towards his master.

The distinction between Rights which I shall presently endeavour to explain, is that all-pervading and important distinction which has been assumed by the Roman Institutional Writers as the main groundwork of their arrangement: namely, the distinction between rights *in rem* and rights *in personam*; or rights which avail against persons generally or universally, and rights which avail exclusively against certain or determinate persons.

The terms "*jus in rem*" and "*jus in personam*," were devised by the Civilians of the Middle Ages, or arose in times still more recent. I adopt them without hesitation, though at the risk of offending your ears. For of all the numerous terms by which the distinction is expressed, they denote it the most adequately and the least ambiguously. The terms which were employed by the Roman Lawyers themselves, with various other names for the classes of rights in question, I shall explain briefly hereafter.

At present, I will merely point at an ambiguity which perplexes and obscures the import of *jus in rem*.

The phrase *in rem* denotes the *compass*, and not the *subject* of the right. It denotes that the right in question avails against persons generally; and *not* that the right in question is a right over a *thing*. For, as I shall show here-

after, many of the rights, which are *jura* or rights *in rem*, are either rights over, or to, *persons*, or have *no* subject (person or thing).

The phrase *in personam* is an elliptical or abridged expression for "in personam certam sive determinatam." Like the phrase *in rem*, it denotes the *compass* of the right. It denotes that the right avails *exclusively* against a *determinate* person, or against *determinate* persons.

Before I proceed to the distinction between the two classes of rights, I must yet interpose a remark relating to terms.

In the language of the Roman Law, and of all the modern systems which are offsets from the Roman Law, the term "Obligation" is restricted to the duties which answer to rights *in personam*. For the duties which answer to rights availing against persons generally, the Roman Lawyers had no distinctive name. They opposed them to *Obligations* (in the strict or proper sense) by the name of *Offices* or *Duties*: Though office or duty is a generic expression; and comprises *Obligations* (in the strict or proper sense) as well as the duties which answer to rights *in rem*.*

Distinction between *jus in rem* and *jus in personam*.

Having premised these remarks, I proceed to state and to illustrate the important distinction in question, with all the brevity which is consistent with clearness.†

Real rights may be defined in the following manner:—"Rights residing in persons, and availing against other persons *generally*." Or they may be defined thus:—"Rights residing in persons, and answering to duties incumbent

* This limitation of the term "Obligation" must be carefully noted. Unless it be clearly understood, the writings of the Roman Lawyers, and of modern Continental Jurists, will appear an inexplicable riddle.

† For the distinction generally, see Hugo, Jurist. Encyc, pp. 75, 298, 325, 335.—Haubold, Jus. Rom. Priv. pp. 7–8.—Savigny, Vom Beruf, etc., pp. 66, 99.—Bentham, Principles of Morals and Legislation, p. 246.—Thibaut, Versuche über einzelne Theile der Theorie des Rechts, II. p. 23.—Vol. I., ("Province of Jurisprudence," etc.;) 'Outline.'

upon other persons generally."* By a crowd of modern Civilians, a real right has been defined as follows:—"facultas personæ competens *sine respectu* ad *certam personam*."

The following definitions will apply to personal rights:—"Rights residing in persons, and availing *exclusively* against persons specifically determinate:—Or, "Rights residing in persons, and answering to duties which are incumbent *exclusively* on persons specifically determinate.† By modern Civilians, a personal right is commonly defined in the following manner:—"facultas personæ competens in *certam* personam."

According to these definitions, a right of the first class and a right of the second class are distinguishable thus: The duty which correlates with the latter is restricted to a person or persons specifically determinate. The duty which correlates with the former attaches upon persons *generally*.

But though this be the essence of the distinction, real rights and personal rights are further distinguishable thus. The duties which correlate with the former are always *negative*: that is to say, they are duties to forbear or abstain. Of the obligations which correlate with the latter, *some* are negative, but *some* (and *most*) are *positive*: that is to say, obligations to do or perform.

Illustrations of the distinction between

As every imaginable right belongs to one of these classes, or else is compounded of rights be-

* In the case of *the right of possession*, the right does not avail against the party whose right is exercised adversely, although he lies under an absolute obligation not to assert his right in certain ways: as by force, etc.

† An obligation attaches *exclusively* upon a *determinate* person or persons. Where it is capable of attaching upon *indeterminate* persons (as *e.g.* the representative of the obligor in cases of contracts, some obligations *ex delicto*, etc.) it is only capable of attaching upon them as *representing* the original obligors. It never extends beyond the successor, singular or universal, of the original obligor.

A right *in personam* avails exclusively against the obligor, though the obligor may be prevented from performance by a third party.

longing to each of these classes, it is manifest that a full exposition of this all-pervading distinction were nearly equivalent to a full exposition of the entire science of Law. Leaving the fuller exposition of it for future Lectures, I shall merely endeavour; at present, to give the clue to its import, by adducing as briefly as possible a few apt examples. *jus in rem* and *jus in personam.*

1st, *Ownership* or *Property* (equivalent to *Dominion*, in its strict or proper signification) is a term of such complex and various meaning that I must defer the full and accurate explanation of it to a future opportunity. But, in order to the illustration of the distinction which I am endeavouring to exemplify and explain, Ownership or Property may be described, accurately enough, in the following manner: "the right to *use* or *deal with* some given subject, in a manner, or to an extent, which, though it is not unlimited, is indefinite." Property.

Now in this description it is necessarily implied, that the law will protect or relieve the owner against every disturbance of his right on the part of any other person. Changing the expression, *all* other persons are bound to *forbear* from acts which would prevent or hinder the enjoyment or exercise of the right.

But, here, the duties which correspond to the right of property terminate. Every *positive* duty which may happen to concern or regard it, is nevertheless foreign or extraneous to it, and flows from some incident *specially* binding the party upon whom the duty is incumbent: for instance, from a contract or covenant into which he enters with the owner, or from a delict which he commits against his right of ownership. In other words, every such *positive* duty is restricted to a *determinate* person, and is, therefore, an *Obligation* (in the sense of the Roman Lawyers). And even a duty which is *negative* and regards the right of ownership, is not an obligation corresponding to that *very* right, in case the *vinculum* be *special*: that is to say, not attaching indefinitely upon

mankind at large, but binding some *certain* person, or some *certain* persons, and arising from some incident which exclusively regards the obliged.*

It follows that Ownership or Property is a *species* of *Jus in rem*. For ownership is a right residing in a person, *over* or *to* a person or thing, and *availing against other persons universally or generally*. It is a right implying and exclusively resting upon obligations which are at once *universal* and *negative*.

Where the subject of *a real right* happens to be a person, the position of the party who is invested with the right wears a double aspect. He has a right (or rights) *over* or *to* the subject as against other persons generally. He has also rights (*in personam*) against the *subject*, or lies under *obligations* (in the sense of the Roman Lawyers) towards the subject. But this is a matter to which I shall revert presently.

The *Servitutes* of the Roman Law, and of the various modern systems which are modifications of the Roman Law, may also be adduced as examples of *real rights*. Servitus.

Servitus (for which the English "Easement" is hardly an adequate expression) is a right to *use* or *deal with*, in a given and definite manner, a subject *owned* by another. Take, for instance, a Right of Way over another's land. Now, according to this definition, the capital difference between *Ownership* and *Servitus* is the following:—The right of dealing with the subject which resides in the owner or proprietor, is larger, and, indeed, *indefinite*: That which resides in the party who is invested with a right of servitude, is narrower and *determinate*.

But, in respect of that great distinction which I am now endeavouring to illustrate, the Right of Ownership or Property, and a Right of Servitude, are perfectly equivalent rights. *Servitus* (like Ownership) is a *real right*. For it

* Instances: Conveyance in fee, with covenant for quiet enjoyment, or for further assurance. Obligation from a trespass.

avails against *all mankind* (including the owner of the subject). Or (changing the expression) it implies an obligation upon *all* (the owner again included) to *forbear* from every act inconsistent with the exercise of the right.

But this *negative* and *universal* duty, is the only obligation which *correlates* with the *jus servitutis*, or which corresponds to that very right. Every *special* obligation which happens to regard or concern it, is nevertheless foreign or extraneous to it, and answers to some right of the opposite or antagonist class.

Suppose, for example, that the servitude has been *constituted* (or granted) by the actual owner of the subject. And suppose that the owner has also *contracted* with the grantee *not* to molest him in the enjoyment or exercise of the right. Now, here, the granter of the servitude lies under *two* duties which are completely distinct and disparate:—One of them arising from the *grant*, and answering to the right which it creates;—the other arising from the *contract* by which he is *specially* bound, and answering to the right *in personam* which the contract vests in the grantee. In case he molest the grantee in the exercise of the servitude, the *injury* is double, though the *act* is single. By one and the same act, he violates an *Officium* which he shares with the rest of mankind, and he also breaks an *Obligation* (in the sense of the Roman Lawyers) which arises from his peculiar position.

Having given an example or two of real rights (or of rights which correspond to duties *general* and *negative*), I will now adduce examples of personal rights: that is to say, rights which avail *exclusively* against persons *certain* or *determinate*, or which correlate with obligations, incumbent upon *determinate* persons, to do or perform, or to forbear or abstain. Contract.

All Rights begotten by *Contracts* belong to this last-mentioned class: although there are certain cases (to which I shall advert hereafter) wherein the right of ownership, and

others of the same kind, are said (by a solecism) to arise from Contracts, or are even talked of (with flagrant absurdity) as if they arose from *Obligations* (in the sense of the Roman Lawyers).

Rights, which, properly speaking, arise from *Contracts*, avail against the parties who bind themselves by contract, and also against the parties who are said to *represent* their persons: that is to say, who succeed on certain events to the aggregate or bulk of their rights; and, therefore, to their *faculties* or means of fulfilling or liquidating their obligations. But as against parties who neither oblige themselves by contract, nor represent the *persons* of parties who oblige themselves by contract, the rights, which, properly speaking, arise from contracts, have no force or effect.

Suppose (for example) that *you* contract with *me* to deliver me some moveable; but, instead of delivering it to *me* in pursuance of the contract, that you sell and deliver it to *another*.

Now, here, the rights which I acquire by virtue of the contract, are the following.

I have a right to the moveable in question as against *you specially*. So long as the ownership and the possession continue to reside in *you*, I can force you to deliver me the thing in specific performance of contract; or, at least, to make me satisfaction, in case you detain it. After the delivery to the *buyer*, I can compel you to make me satisfaction for your breach of the contract with *me*.

But *here* my rights terminate. As against strangers to that contract, I have no right whatever to the moveable in question. And, by consequence, I can neither compel the buyer to yield it to *me*, nor force him to make me satisfaction as detaining a thing of *mine*. For "*obligationum* substantia non in eo consistit *ut aliquod nostrum faciat*, sed *ut alium nobis obstringat* ad dandum aliquid, vel faciendum, vel præstandum." [Or rather, "ad *faciendum*" (including "dandum") vel "*non* faciendum." "*Præstandum*" seems to include both.]

But if you deliver the moveable, in pursance of your contract with *me*, my position *towards other persons generally* assumes a different aspect. In consequence of the delivery by *you* and the concurring apprehension by *me*, the thing becomes *mine*. I have *jus in rem*: I have a right *over* the thing, or a right *in* the thing, as against all mankind: A right which answers to obligations *universal* and *negative*. And, by consequence, I can compel the restitution of the thing from *any* who may take or detain it, or can force him to make me satisfaction as for an injury to my right of ownership. In the language of Heineccius (a celebrated Civilian of the last Century), "Ubi rem *meam* invenio, ibi eam *vindico*: sive cum *eâ* personâ *negotium mihi fuerit*, sive non fuerit. Contra, si a bibliopolâ librum emi, isque eum *nondum mihi traditum* vendiderit iterum Sempronio, ego sane contra Sempronium agere nequeo; quia cum Sempronio nullum mihi unquam intercessit negotium. Sed agere debeo adversus bibliopolam a quo emi: quia ago ex contractu, i. e. ex jure *ad* rem."

All rights which arise from contracts and (speaking generally) all rights *in personam*, are rights to *acts* or *forbearances* on the part of determinate persons, and to nothing more. At first sight, that species of *jus in personam* which is styled *jus* AD *rem* may appear to form an exception. It may seem that the party who is invested with the right, has a right *to* a thing, or a right *in* a thing, as against the party who lies under the corresponding obligation. But, in every case of the kind, the right of the party entitled amounts, in strictness, to this: He has a right to *acquire* the thing from the opposite party, or to compel the party to make the thing *his* by an *act* of conveyance or transfer. It is only by an ellipsis, or for the sake of brevity in the expression, that the party invested with the right is said to have a right to a *thing*.*

* In the language devised by the Canonists, and adopted by the modern Civilians, he has *jus ad rem*: that is to say, *jus ad rem acquirendam*.

Take the following examples.

1st, If you contract with me to deliver me a *specific* thing, I am said to have *jus* AD *rem:* that is to say, a right to the thing which is the subject of the contract, as against *you specially*. But, in strictness, I have merely a right to the *acquisition* of the thing: a right of compelling you to give me *jus in rem, in* or *over* the thing: to do some *act*, in the way of grant or conveyance, which shall make the thing *mine*.

2dly, If you owe me money determined in point of *quantity*, or if you have done me an injury and are bound to pay me damages, I have also a right to the *acquisition* of a thing; but, strictly and properly speaking, I have not a right to a *thing*. I have a right of compelling *you* to deliver or pay me moneys, which are not determined in *specie*, and as yet are not *mine:* though they *will* be determined *in specie*, and will become *mine* by the act of delivery or payment.

In this case, the nature of the right is obvious. For as there is no determinate thing upon which it can possibly attach, it cannot be a right to a *thing*.

3dly, Suppose that you enjoy a monopoly by virtue of a patent; and that you enter into a contract with *me*, to transfer your exclusive right in my favour. Now here, also, I have jus *ad* rem, but it is utterly impossible to affirm that I have a right to a *thing*. The subject of the contract is not a determined thing, nor a thing that can be determined. My right is this: a right of compelling *you* to transfer a right *in rem*, as *I* shall direct or appoint. If I may refine upon the expression which custom has established, I have not so properly *jus ad rem*, as *jus* AD JUS *in rem*.

And this, indeed, is the accurate expression for *every* case of that species of *jus in personam* which is styled *jus ad rem*. In every case of the kind, the party entitled has *jus in personam* AD *jus in rem acquirendam*. That is to say, he has a right, availing against a determinate person, to the *acquisition* of a right availing against the world at large. And,

by consequence, his right is a right to an *act* of conveyance or transfer on the part of the person obliged.

With regard to the other species of *jus in personam*, there can be no doubt. If you contract with me to do work and labour, or if you contract with me to forbear from some given act, it is manifest that my right is a right to acts or forbearances, and to nothing more.

The following are some of the passages referred to in the note, p. 32, together with the marginal notes attached to them. Those from Hugo's 'Juristische Encyclopädie,' are as follows:—

"Die Foderungen sind überhaupt Rechtsverhältnisse, *bei welchen nothwendig auf einen bestimmten Verpflichteten Rücksicht genommen werden muss.* In der römischen Sprache sind sie theils Obligationes, theils Actiones, je nachdem sie für sich *bestehende Verhältnisse* zwischen den Creditor und Debitor (*Sanctioned*), oder Verhältnisse zur *Verfolgung irgend eines andern Rechtsverhältnisses* sind (*Sanctioning*). Bei den Alten unterscheiden sie sich auch dadurch, dass die *Obligatio* an sich nie der Rechtsfähigkeit des Verpflichteten ein Ende machen kann, wie dies bei der *Actio* oft der Fall ist."—*Hugo, Jurist. Enc.* vol. i. p. 75.

Rights of Action are classed with Obligations; whilst obligations to suffer punishment (which are not more sanctionative than the former), are referred (together with Crimes and Criminal Procedure) to Public Law. Civil Procedure is completely separated from the Rights of Action, and the Matters for Exception, upon which it is built. Civil Injuries are not considered directly. Sanctionative Civil Rights which are exercised extrajudicially are forgotten.—*Marginal Note.*

Page 298.—'*Arten von Rechten an einer Sache.*'

Hugo enumerates three, viz. Eigenthum, Servitut, and Pfandrecht.* "Doch," he continues, "muss bemerkt werden, warum

* Mortgage, etc., is *Jus in Re* given by way of security for the performance of some obligation, though it may lead in the event to the enjoyment of the subject. The Right of the Obligor may be Property or Servitus.—*Marginal Note.*

das Erbrecht und der Besitz nicht hierher gehören. Ersteres, weil es eine Art des Eigenthums, oder eine Art es zu erwerben;* und Letzterer, weil es etwas mehr auf dem gegenwärtigen natürlichen Zustande (Factum) als auf einem Rechte beruhendes ist; wodurch freilich auch ein strenges Recht gegen den unschuldigen dritten Besitzer entstehen kann, wenn der Anfang des Besitzes (*causa* oder *initium possessionis*, späterhin *titulus*) es erlaubt;† oft entsteht aber daraus nur eine Obligatio."

* And setting aside this ambiguity—assuming that it denotes *Jus*, and not *also* a mode of acquisition—it cannot be classed with *Jura in Re*, because it also includes *Jus ad Rem*. Possession must be considered under three aspects. 1° As *Titulus*, as the fact (the fact of enjoyment or occupancy) which gives a right as against *all* except the *proprietor*. 2° As the name of this right. 3° As a *titulus*, which combined with other *tituli* gives a right even as against the proprietor.—*Marginal Note.*

† *Jus ad Rem* against the alienor by virtue of the warranty for Title.—*Marginal Note.*

Page 325.—'*Von Foderungen.*'

"Das Recht aus eine *Obligatio* hat man lange Zeit *jus ad rem*, späterhin, *jus in personam* genannt, beydes nicht sehr geschickt; und *jus personale*, persönliches Recht, ist noch zweideutiger;" . . . .‡

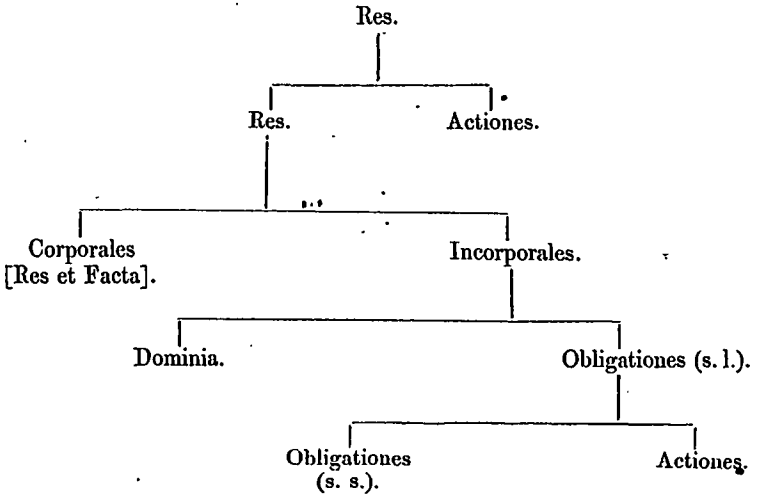
‡ Every obligation is positive or negative: is an obligation to give or to perform (in one word, to perform); or to permit, *i.e.* not to hinder.—*Marginal Note.*

Subjects of Private Law.

"Juris in artem redacti, seu systematis juris, quantum ad jus privatum, tres constituuntur partes primariæ *maxime ab institutorum ejusdem juris varietate* ductæ: a.a. Jus Personarum, quod de personarum conditione, et in primis de statu familiæ præcipit: b.b. Jus Rerum, quo de rerum divisionibus et jure circa res, tam proprias quam alienas, disseritur; denique: c.c. Jus Obligationum et Actionum, quod doctrinam, tum de jure adversus certos debitore, per obligationem competente, tum de *variis modis jus, quod supra traditum est, in judicio persequendi* tractat. Quibus partibus tamquam corollarium, sed sine quo ipsa juris privati

ratio vix intelligi possit, recte adnectitur universæ *formulæ et ordinis judiciorum* descriptio.—*Haubold, Institutorum Juris Privati Romani Lineamenta,* p. 7.

On the blank part of the page, referred to in 'Thibaut's Versuche,' is the following table.



From a pencil note it appears that Mr. Austin intended to 'explain *vivâ voce*' the subjects indicated in the following memoranda, and also the subject of the note in page 45."—*S. A.*

[Remark *vivâ voce* upon so-styled contracts imparting *jus in rem.*

All contracts (properly so called) give rights to Acts and Forbearances (on the part of the persons *obliged*), and to nothing more. The *consent* of the parties will not distinguish a contract from a conveyance.

Illustrate the difference between contract and conveyance, by *promise to give,* and *gift.*]

See Table II. Note 3, B. d.*

Rights of action, as well as rights *ex contractu* (and indeed rights *in personam* universally) are rights to *acts* or *forbearances* on the part of *determinate* persons, and to nothing more. (Exemplify.)

[Nature of actions *in rem*. Examples: Vindications. Real Actions of the English law. Ejectment. Detinue. Trover, not: for though founded on a right *in rem*, it seeks satisfaction, and not restitution or prevention.]

* This is a reference to the Tables mentioned in the Preface to Vol. I.

LECTURE XV.

In my last Lecture, I attempted to explain that leading and important distinction, which has been assumed by the Roman Institutional Writers, as the principal basis (or one of the principal bases) of their System or Arrangement: Namely, the distinction between rights *in rem* and rights *in personam;* or between rights which avail against persons *universally* or *generally*, and rights which avail *exclusively* against *certain* or *determinate* persons.

Having first endeavoured to state it in general or abstract expressions, I tried to illustrate the distinction between the two classes of rights by adducing examples of each.

As examples of *jura in rem*, I referred to the right of ownership, property or dominion; and also to those rights over subjects owned by others, which are styled by the Roman Lawyers *servitutes* or *jura servitutis*, and which may be styled in our own language (though not with perfect propriety) *easements* or *rights to easements*.

As examples of rights *in personam*, I referred to rights *ex contractu*, or to rights which arise directly from contracts properly so called. And I also adverted to the rights which arise from injuries or wrongs, and which (taking the term *action* in a large or extensive import) may be styled *rights of action*.*

* Action is here synonymous with judicial remedy or prevention. Cases in which rights to judicial remedy or prevention are not styled *technically* rights of action. Interdict *unde vi*. Special Injunction. Habeas Corpus. ("*Explain vivâ voce.*")

The matter here referred to does not appear in the preceding Lecture. —*S. A.*

Further illustrations of the distinction between *jus in rem* and *jus in personam.*

In order that I may further illustrate the import of the distinction in question, I will now call your attention to rights over *persons*, and to certain rights, availing against the world at large, *which have no determinate subjects* (persons or things).

Jus in rem restricted by certain writers to *jus in rem* over or in *things.*

Looking at the *obvious* signification of the epithet *real*, (and of the phrase *in rem*, from which the epithet is derived,) we should naturally conclude that a *real* right must be a right in a *thing*. And, accordingly, by many of the modern expositors of the Roman Law, the term *real rights* (or *jus in rem*) is restricted to *such* of the rights availing against the world at large, as are rights over *things* (in the proper acceptation of the expression).

When I say that they restrict the term in the manner which I have now mentioned, I mean that they so restrict it when they state its meaning in *generals*, or when they attempt to *define* it. For, when they are occupied with the *detail* of the Roman Law, they unconsciously deviate from their own insufficient notion, and extend the term to numerous rights which are *not* rights over *things*. For example, it is admitted or assumed by every Civilian, that the right of the Roman heir over or in the *heritage* is a *real* right.

I say the right of the heir over or in the *heritage*. For, independently of the *several* rights which devolve to him from the testator or intestate, he has a right in the *aggregate* which is formed by those several rights; and which aggregate, coupled with the obligations of the deceased, constitute the complex whole which is styled the *hereditas* or heritage. In this heritage, so far as it consists of rights, the heir has a right which avails against the world at large, and which he can maintain judicially, against any who may gainsay or dispute it, by an appropriate *vindication*: meaning by a vindication, an action grounded on an injury to a *real* right, and seeking the restoration of the injured party

to the unmolested exercise of the right in which he has been disturbed.

But though this right of the heir is indisputably a *real* right, it is not a right *over* or *in* a *thing*, or *over* or *in things*. It is properly a right in an *aggregate* of rights; partly, perhaps, consisting of rights over *things*, but partly consisting of rights which are of a widely different character: namely, of *debts* due to the testator or intestate; or of such *rights of action*, vested in the testator or intestate, as devolved to his heir or general representative.

Besides this right of the heir over or in the *heritage*, (which is deemed by every Civilian a *real* right,) there are numerous *real* rights which are *not* rights over *things*: being rights over *persons*; or being rights to *forbearances* merely, and having *no* subjects (persons or things).

Rights *in rem* over persons.

Of rights existing over persons, and availing against other persons generally, I may cite the following as examples:—The right of the father to the custody and education of the child:—the right of the guardian to the custody and education of the ward:—the right of the master to the services of the slave or servant.

Against the child or ward, and against the slave or servant, these rights are *personal* rights: that is to say, they are rights answering to *obligations* (in the sense of the Roman Lawyers) which are incumbent *exclusively* upon those *determinate* individuals. In case the child or ward desert the father or guardian, or refuse the lessons of the teachers whom the father or guardian has appointed, the father or guardian may compel him to return, and may punish him with due moderation for his laziness or perverseness. If the slave run from his work, the master may force him back, and drive him to his work by chastisement. If the servant abandon his service before its due expiration, the master may sue him as for a breach of the *contract* of hiring, or as for breach of an obligation (QUASI *ex contractu*) implied in the *status* of servant.

But considered from another aspect, these rights are of another character, and belong to another class. Considered from that aspect, they avail against persons *generally*, or against the world at large; and the duties to which they correspond, are invariably *negative*. As against other persons generally, they are not so much rights to the custody and education of the child, to the custody and education of the ward, and to the services of the slave or servant, as rights to the *exercise* of such rights *without molestation by strangers*. As against strangers, their substance consists of duties, incumbent upon strangers, to *forbear* or *abstain* from acts inconsistent with their scope or purpose.

In case the child (or ward) be detained from the father (or guardian), the latter can *recover* him from the stranger. In case the child be beaten, or otherwise harmed injuriously, the father has an action against the wrong-doer for the wrong against his *interest* in the child. In case the slave be detained from his master's service, the master can recover him *in specie* (or his value in the shape of damages) from the stranger who wrongfully detains him. In case the slave be harmed and rendered unfit for his work, the master is entitled to satisfaction for the injury to his right of ownership. If the servant be seduced from his service, the master can sue the servant, for the breach of the contract of hiring; and *also* the instigator of the desertion, for the wrong to his *interest* in the servant. In case the servant be harmed, and disabled from rendering his service, the harm is an injury to the master's *interest* in the servant, as well as to the person of the latter.

The correlating conditions or *status* of husband and wife, will also illustrate the nature of the capital distinction, which I am endeavouring to explain and exemplify.

Between themselves, each has *personal* rights availing against the other, and each is subject to corresponding *obligations* (in the sense of the Roman Lawyers). Moreover, each has a right in the other, availing against the rest of the

world, or answering to duties attaching upon persons generally. Adultery *by* the wife violates a right of the former class, and entitles the husband (against the *wife*) to an absolute or qualified divorce. Adultery *with* the wife violates a right of the latter class, and gives him an action for damages against the adulterer.

A person who is the *subject* of *jus in rem* is placed in a position *like* the position of a *thing* which is the subject of a similar right. And may be styled (by analogy) *a thing.*

And here I may remark conveniently, that where a *real* right is *over* a person, or where a *personal* right is a right *to* a person, the person is neither invested with the right, nor is he bound by the duty to which the right corresponds: the right *residing* in a person or persons distinct from himself, and *availing* against a person or persons also distinct from himself. He therefore is merely the *subject* of the real or personal right, and occupies a position *analogous* to that of a *thing* which is the subject of a similar right. Consequently, whatever be the kind or sort of the real or personal right, he might be styled *analogically*, (when considered as its subject,) *a thing.*

For example, Independently of his rights against the child, and independently of his obligations towards the child, the parent has a right *in* the child availing against the world at large. And, considered as the subject of this last-mentioned right, the child is placed in a position analogous to that of a *thing*, and might be styled (in respect of that analogy) *a thing.*

Independently of his rights against the parent, and independently of his obligations towards the parent, the child has a right *in* the parent availing against the world at large. The murder of the parent by a third person, might not only be treated as a *crime*, or *public wrong*, but might also be treated as a *civil* injury against that right in the parent which belongs to the child. Before the abolition of Appeals in criminal cases,* this was nearly the case in the Law of England. The murderer was obnoxious to *punish-*

* By the 59 Geo. III. c. 46.

ment to be inflicted on the part of the State; and the wife and the heir of the slain were entitled to vindictive *satisfaction*, which they exacted or remitted at their pleasure.

Now, considered as the subject of the real right which resides in the child, the parent is placed in a position *analogous* to that of a *thing*, and might be styled (in respect of that analogy) *a thing*. In short, whoever is the subject of a right which resides in *another* person, and which *avails* or *obtains* against a *third* person or persons, is placed in a position *analogous* to that of a *thing*, and might be styled (in a respect of that analogy) *a thing*.

But though *any* person, as the *subject* of *any* right, might be styled (by analogy) *a thing*, this analogical application of the term *thing* has (in fact) been partial and capricious. So far as I can remember, there are two instances, and only two, in which the term *thing* has been applied to *persons*, considered as the *subjects* of rights.

Considered as the *subject* of the *real* right which resides in the master, the *slave* is occasionally ranked by the Roman Lawyers with *things*. And, considered as the *subject* of the *real right* which resides in the *paterfamilias*, the *filiusfamilias* has been classed with *things* by certain modern Civilians.

According to a current opinion, which I mentioned in a preceding Lecture, the slave was not considered by the Roman Lawyers as belonging to the class of *persons*. But this opinion, though commonly received, is utterly destitute of foundation. Considered as bound by duties towards his master and others, the slave is ranked by the Roman Lawyers with physical *persons;* and is spoken of as bearing, or sustaining, a person, *status*, or condition. Considered as the subject of the Right residing in his master, and availing (*not* against himself, but against third persons) he is occasionally styled *res*. But, even as considered from this aspect, he is usually deemed a person rather than a thing, and is styled usually *servilis persona*.

Many have been shocked and scandalized by the Roman

Jurists, because these hard-hearted and cold-blooded lawyers degraded the slave to a level with *things*.

Upon which gross misconception, I remark as follows:

It is *not true* that the Roman Lawyers ranked slaves with things. Or *if* it be true, it is only true in that limited sense which I have just explained. And, admitting that the Roman Lawyers ranked slaves with things, it follows not that they were cold-blooded men, and intended to degrade and vilify the miserable slave. In styling the slave a *thing*, they considered him from a certain aspect: namely, as being the *subject* of a right residing in *another* person, and availing against *third* persons. And (as I have proved to satiety) the *analogy* which led these lawyers to rank the slave with things, would justify the extension of the term *thing* to *any* person who is the *subject* of *any* right.

Much eloquent indignation has also been vented superfluously on the application of the term *chattel* to the slaves in the English colonies: seeing that the term *chattel*, as applied to the slave, does not import that the slave is deemed a *moveable thing*, but that the rights of the master over his slaves, like his analogous rights over his moveable things, devolve, on the master's intestacy, to a certain class of his representatives.

Jus *realiter* personale. Rights *in rem*, without determinate subjects.

Having cited examples of *real* rights which are rights over *persons*, I will cite an example or two of *real* rights, which are *not* rights over things or persons, but are rights to *forbearances* merely.

A man's right or interest in his *good-name* is a right which avails against persons, as considered generally and indeterminately: They are bound to *forbear* from such imputations against him as would amount to *injuries* towards his right in his reputation. But, though the right is a *real* right, there is no subject, thing or person, over which it can be said to exist. If the right has any subject, its subject consists of the contingent advantages which he may possibly derive from the approbation of others.

A monopoly, (or the right of selling exclusively commodities of a given class) is also a *real* right: All persons, other than the party in whom the right resides, are bound to *forbear* from selling commodities of the given class or description. But, though the right is a *real* right, there is no subject, person or thing, over which it can be said to exist. If the right has any subject, its subject consists of the future profits, above the average rate, which he may possibly derive from his exclusive right to sell.

A right in a *Status* or Condition (considered as an aggregate of rights and capacities) is also a *real* right. I am not able at present to explain the nature of Conditions. To determine precisely what a *Status is*, would require a long and intricate dissertation. For the purpose immediately before me, the following remarks will suffice.

A *Status* or Condition may be purely *onerous*, or may consist of duties only. Such was the condition of the slave, according to the older Roman Law. He was the *subject* of rights residing in his master, and availing against third persons. He also was bound by duties towards his master and others. But he had not a particle of right as against his master or even against strangers. Considered as the subject of rights residing in his master, he was susceptible of *damage*: But he was not susceptible of *injury*.

Now a right in a condition which is purely burthensome, is hardly conceivable. But, so far as a condition consists of rights, and of capacities to take rights, we may imagine a right in the *condition* considered as a complex whole.

According to the Roman Law, as the heir has a right in the *heritage* (abstracted from its several parts), so has the party invested with a *condition*, a right or interest in the condition itself (abstracted from the rights and capacities of which it is compounded). His right in the condition, considered as an aggregate or whole, is *analogous* to the right of ownership in a single or individual *thing*.

Consequently, wrongs against this right are *analogous* to

wrongs against ownership; and, according to the practice of the Roman Law, wrongs of both classes are redressed by *analogous* remedies. Where the individual thing is unlawfully detained from the owner, he may *vindicate* or recover the thing. And where the right in the condition is wrongfully disputed, the party may assert his right by an appropriate action, which is deemed and styled a *vindication*.*

NOTES FOUND AT THE END OF LECTURE XV.

The definition of *jus in rem*, that "it begets a vindicatory action against every unlawful disturber," is not universally true. It may beget a mere right to satisfaction (*e. g.* Trover). If true, it is a mere consequence or property of the right, and is not of its essence.

Besides it merely amounts to this: that the disturbance begets a right of action against the disturber or violator; which is true of every disturbance of a right *in personam*.

N.B. Any prevention of the completion of an Obligation (*stricto sensu*) prevented by a third party, would be no violation of a Right in the *Obligee;* or, if it would, would be a violation of a distinct Right. A stranger who engages a builder to undertake an extensive work, or wounds or maims him (thereby, in either case, preventing him from completing a previous contract with myself) violates no Right in *me;* and my remedy is against the *builder* for the breach of contract with myself. A stranger who inveigles my servant, violates, not my *jus ad rem* under the contract, but my *jus in re*. The servant himself, indeed, does; and for this breach of his Obligation (*stricto sensu*), I may sue him on the contract.

Obligation to pay taxes; Obligation to military service, etc.

The obligations to military service, etc., seem to be merely *absolute* obligations. (See Lecture XLIX.) The State, to which it is

* See Bentham's 'Principles,' etc., "payment," p. 246. Hugo, Jur. Enc. p. 335. Blackstone, vol. ii. p. 408; vol. iii. p. 88.

due, and which alone can have the Right, has not properly *Rights*. Besides, there is no Person or Thing to which the State has a right, as against all. It has merely a right to the services of the *determinate* individual. It has not a right to the money in specie, to the services, etc., as against others; but a right to the *payment* of the tax and the performance of the service, against the determinate person upon whom the obligation rests. So soon as the tax is paid, the Government indeed has *jus in re* in the money which is rendered; and as against other persons, it has a right (analogous to the *jus in re* of an ordinary master) to the services of the determinate person. *e. g.* A conscript is punishable for desertion by virtue of the Obligation (*stricto sensu*)—a person seducing him to desert, by virtue of the obligation which answers to the *jus in re*.

The right which the Government has to the services of its subjects generally, is in truth not *a* Right to a person or thing against all; but Rights against a number; rights that they shall perform a particular *obligation* on the happening of such an incident.

(The passage in Hugo referred to in the note at the bottom of the last page, is as follows, together with Mr. Austin's marginal notes.)

"Unter den vermischten Fällen gibt es einige, die *mit einem Vertrage Aehnlichkeit haben** (die Foderung entsteht *quasi ex contractu*; z. B. *negotia gesta*, in diesem Sinne, Verwaltung einer Vormundschaft, Verwaltung von etwas Gemeinschaftlichem, Antretung einer Erbschaft in Beziehung auf die Vermächtnisse, Entrichtung von etwas, was man nicht schuldig ist); andere grenzen an Vergebungen† (*quasi ex maleficio*, z. B. das *Einstehenmüssen fur andere* bei gewissen Gelegenheiten): aber auch noch auf andere Art entsteht eine Foderung; z. B. aus dem Auswerfen

* Quasi-Contract: An incident from which the *Obligor* derives a *benefit*: a benefit which he ought to requite, or which he ought to surrender to the party at whose cost he has obtained it. In the last case, there seems to be no obligation without demand and refusal; for till then, the intention to retain cannot be known.

† Quasi-Damage: *Damage* done to the *Obligee*, but without intention or negligence on the part of the obligor.

(*lex Rhodia de jactu*) ; auf Unterhalt, *Dos* und Beerdigung,* auf die Abgaben,† und auf das *Einstehen*‡ für die physischen und juristischen Fehler einer Sache (*ædilitium, edictum* und *evictio*)." —*Hugo, Jurist. Encyc.*, p. 335.

* Quasi-Contract; there being benefit to the Obligor.

† Neither; unless by a fiction we suppose the governed, in consideration of protection, *quasi-contraxisse* with the Government. The distinction is useless. In the case of the *quasi-contract*, there has been no *contract*. In the case of the *quasi-damage* there has been *damage*, but no *injury*; at least, no *injury* on the part of the obligor, though there may have been on the part of his representatives. The *injury* on his part does not arise till he refuses satisfaction. The obligation however *is like* an obligation *ex contractu*.

‡ Implied warranty: *i.e.* An obligation to satisfy, annexed to the original contract: and therefore a *Contract*, though by virtue of a dispositive Law.

LECTURE XVI.

In the preceding Lectures, I have entered upon the analysis or explanation of the term "Right."

Now (as I shall endeavour to demonstrate in this evening's discourse) all that can be affirmed of Rights *considered universally*, amounts to a brief and barren generality, and may be compressed into a single proposition, or into a few short propositions.

But, before I could shew the little which can be affirmed of rights *in general*—or (rather) before I could shew *how* little can be affirmed of rights in general, it was necessary that I should advert to *persons*, considered as invested with rights; to *things* and *persons*, considered as the *subjects* of rights; to *acts* and *forbearances*, considered as the *objects* of rights; and to a leading or capital *distinction* which obtains between rights themselves.

Accordingly, I called your attention to the following objects:—

1st, To *persons* as invested with rights, and as lying under duties or obligations. 2dly, To *things* as *subjects* of rights, and of the duties corresponding to rights. 3dly, To *persons* as placed in a position *analogous* to the position of *things*: that is to say, *not* as invested with rights, or as lying under duties or obligations, but as *subjects* of rights residing in *other* persons, and availing against *strangers* or *third* persons. 4thly, To *acts* and *forbearances* as *objects* of rights, and of duties or obligations correlating with rights. 5thly, and lastly, To the distinction between *jus in rem* and

jus in personam; or between rights which avail against persons *universally* or *generally*, and rights which avail against persons *certain* or *determinate*.

Purpose and order of the present Lecture.

In the present Lecture, I shall endeavour to explain the nature or essence which is common to *all* rights. Or (changing the expression) I shall endeavour to indicate the point at which they meet or coincide; or to shew the properties wherein they resemble or agree; or to state *that* which may be affirmed of rights *universally*, or without respect to the generic and specific differences by which their kinds and sorts are separated and distinguished.

In trying to accomplish this purpose I shall proceed in the following order:

1st, I shall endeavour to state, in general expressions, the nature, essence, or properties, common to *all* rights. 2ndly, I shall advert briefly to certain *classes* of rights; and I shall endeavour to shew, that they agree in nothing, excepting those common properties. 3rdly, I shall examine certain *definitions* of the term "*right;*" and I shall endeavour to elucidate the common nature of rights, by shewing the vices or defects of those definitions.

Common nature of rights.

Every right is a right *in rem*, or a right *in personam*.

The essentials of a right *in rem* are these:

It resides in a determinate person, or in determinate persons, and avails against *other* persons *universally* or *generally*. Further, the duty with which it correlates, or to which it corresponds, is *negative:* that is to say, a duty to forbear or abstain. Consequently, all rights *in rem* reside in determinate persons, and are rights to *forbearances* on the part of persons *generally*.

The essentials of a right *in personam* are these:

It resides in a determinate person, or in determinate per-

sons, and avails against a person or persons certain or determinate. Further, the obligation with which it correlates, or to which it corresponds, is negative *or* positive: that is to say, an obligation to forbear or abstain, or an obligation to do or perform. Consequently, all rights *in personam* reside in determinate persons, and are rights to *forbearances* or *acts* on the part of determinate persons.

It follows from this analysis, first, That all rights reside in *determinate* persons. Secondly, That all rights correspond to duties or obligations incumbent upon *other* persons: that is to say, upon persons distinct from those in whom the rights reside. Thirdly, That all rights are rights to *forbearances* or *acts* on the part of the persons who are bound.

These (I believe) are the only properties wherein *all* rights resemble or agree.

Consequently, right *considered in abstract* (or *apart* from the *kinds* and *sorts* into which rights are divisible) may be conceived and described generally in the following manner.

Every legal duty arises from a *Command*, signified, expressly or tacitly, by the *Sovereign* of a given Society.

Every legal duty binds the party obliged, by virtue of a legal sanction. In other words, in case the party obliged violate the duty imposed upon him, he will be obnoxious or liable to evil or inconvenience, to be inflicted by sovereign authority.

[Now the person who is subject to a duty, or upon whom a duty is incumbent, is bound to do, or to forbear from, some given act or acts. And further, he is bound to do, or to forbear from, the given act or acts absolutely or relatively; That is to say, *without respect* to a determinate person or persons, or *towards* a determinate person or determinate persons.]

The *objects* of duties are Acts and Forbearances. Or (changing the expression) every party upon whom a duty

is incumbent, is bound to do or to forbear. Or (changing the expression again) the party violates the duty which is incumbent upon him, by *not* doing some act which he is commanded to do, or by doing some act from which he is commanded to abstain.

Duty is the basis of Right. That is to say, parties who *have* rights, or parties who are invested with rights, have rights to acts or forbearances enjoined by the sovereign upon *other* parties.

Or (in other words) parties invested with rights *are* invested with rights, because other parties are bound by the command of the sovereign, to do or perform acts, or to forbear or abstain from acts.

In short, the term "right" and the term "*relative* duty" signify the same notion considered from different aspects. Every right supposes distinct parties: A party commanded by the sovereign to do or to forbear, and a party *towards* whom he is commanded to do or to forbear. The party to whom the sovereign expresses or intimates the command, is said to lie under a *duty*: that is to say a *relative* duty. The party *towards* whom he is commanded to do or to forbear, is said to have a *right* to the acts or forbearances in question.

Or the meaning which I am labouring to convey may be put thus.

Wherever a right is conferred, a relative duty is also imposed: the right being conferred upon a certain or determinate party, *other* than the party obliged. Or (changing the expression) a party is commanded by the sovereign to do or to forbear from acts, and is commanded to do or forbear from those given acts *towards*, or *with regard to*, a party *determinate* and *distinct from himself*.

For (as I shall shew hereafter) duties towards oneself and duties towards persons indefinitely, can scarcely be said with propriety to correlate with rights. As against *others*, I have a right to my life. For others are bound or obliged

to forbear from acts which would destroy or endanger my life. But it can scarcely be said, with propriety, "that I have a right to my own life *as against myself:*" Although I am legally bound to abstain from *suicide*, by virtue of certain sanctions whose nature I shall explain hereafter. And the same may be affirmed of duties towards persons indefinitely: that is to say, towards the community at large, or towards mankind generally.

A law which prohibits the importation of certain foreign commodities, to the end of encouraging the production of the corresponding domestic commodities, imposes a *duty* to *forbear* from importing the commodities which it is said to prohibit. But it can hardly be said, with propriety, that the law confers a *right*. For there is no *determinate* party who would be injured by a breach of the duty, or towards or with regard to whom the prohibited act is to be forborne. In the technical language of certain systems, breaches of such duties are offences against the sovereign, and the sovereign is invested with *rights* answering to those duties.

But to impute *rights* to the sovereign, is to talk absurdly. For rights are conferred by commands issuing *from* the sovereign.

As violating commands issuing from the sovereign, breaches of the duties in question are offences against the sovereign. But so is a breach of every imaginable duty. For all duties are the creatures of sovereign will, or are imposed by Laws or Commands emanating from the Sovereign or State. The truth is, that duties towards oneself, and towards persons indefinitely, are *absolute* duties. That is to say, there is no *determinate* party whom a breach of the duty would injure, or towards or in respect of whom the duty is to be observed.

It is difficult to indicate the import of the term "Right" (considered as an abstract expression embracing *all* rights). For right (as thus considered) is so extremely abstract—is so extremely remote from the particulars which are comprised

in its extension—that its meaning or import is, as it were, a shadow, and closely verges upon the confines of *no*-meaning.

All the ideas or notions which are comprehended by that slender meaning, may, I think, be compressed into the following propositions.

Right, like Duty, is the creature of Law, or arises from the command of the Sovereign in a given independent society.

Every right is created or conferred in the following manner.

A person or persons are commanded to do or to forbear *towards*, or with regard to, *another* and a *determinate* party.

The person or persons to whom the command is directed, are said to be *obliged*, or to lie under a *duty*.

The party *towards* whom the duty is to be observed, is said to have a *right*, or to be invested with a right.

In order that we may conceive distinctly the nature of rights, we must descend from Right in abstract to the species or sorts of rights. We must take a right of a given species or sort, and must look at its scope or purpose. That is to say, we must look at the end of the lawgiver in conferring the right in question, and in imposing the duty or obligation which the right in question implies.

Now the ends or purposes of different rights are extremely various. The end of the rights *in rem* which are conferred over things, is this: that the entitled party may deal with, or dispose of, the thing in question in such or such a manner, and to such or such an extent. In order to that end, other persons generally are laid under duties to forbear or abstain from acts which would defeat or thwart it.

But from this general notion of rights over things, we must descend to the species into which they are divisible. For the ends of the various rights which are conferred over things, differ from one another. And what I have said of rights *in rem* over things, will apply to such rights over

persons as avail against other persons generally; and also to such rights availing against other persons generally as have no determinate subjects.

The ends or purposes of rights *in personam* are widely different from those of rights *in rem*.

The ends or purposes of the various rights *in personam* are again extremely different from each other.

Certain definitions of a right, examined.

A right has been defined by certain writers, as that security for the enjoyment of a good or advantage which one man derives from a duty imposed upon another or others.

It has also been said that rights are powers:* powers over, or powers to deal with, things or persons.

Objections: 1st, *all* rights are not powers over things or persons. All (or most of) the rights which I style rights *in personam* are merely rights to acts or forbearances. And many of the rights which I style *jura in rem* have no subjects (persons or things).

2ndly. What is meant by saying that a right is a power? The party invested with a right, is invested with that right by virtue of the corresponding duty imposed upon another or others. And this duty is enforced, not by the power of the party invested with the right, but by the power of the state. The power resides in the state; and, by virtue of the power residing in the state, the party invested with the right is enabled to exercise or enjoy it.†

* In a note, Mr. Austin proposes to "read from Bentham's 'Principles of Morals and Legislation,' such passages as relate to the difficulty of defining Right in the abstract, and to the little which such a definition can comprise." These passages are to be found at p. 221–223.—*S.A.*

† "La loi me défend-elle de vous tuer? Elle m'impose l'*obligation* de ne pas vous tuer. Elle vous accorde le *droit* de ne pas être tué par moi; elle exige de moi le service négatif qui consiste à m'abstenir de vous tuer." —*Bentham, Traités*, etc., vol. i. p. 154.

A *service* cannot be negative; though an obligation (*not* to obstruct the njoyment of a subject from which uses or services are derivable) may.—*Marginal Note.*

It may, indeed, be said, that a man has a power over a thing or person, when he can deal with it according to his pleasure, free from obstacles opposed by others. Now in consequence of the duties imposed upon others, he is thus able. And, in that sense, a right may be styled a power. But, even in this sense, the definition will only apply to certain rights to *forbearances*. In the case of a right to an *act*, the party entitled has not always (or often) a power.

3rdly. *Facultas faciendi* (*aut non faciendi*). This definition is open to the same objections as the last definition. "*Facultas*," what?

4thly. "A person has a right, when the law authorizes him to exact from another an act or forbearance." The test of a right:—that (independently of positive provision) the acts or forbearances enjoined are not incapable of being enforced civilly or in the way of civil action: *i.e.* at the discretion or pleasure of the party towards whom they are to be done or observed. This would distinguish them from absolute duties. For to talk of a man enforcing a duty against himself is absurd. And where there is no determinate person towards whom it is observed, it is incapable of being enforced civilly.

Right;—the capacity or power of exacting from another or others acts or forbearances;—is nearest to a true definition.

For all these reasons, I say that a party has a right, when another or others are bound or obliged by the law, to do or to forbear, *towards* or *in regard of* him.

But, as I stated at the outset of the analysis, the full import of the term "right" cannot be made to appear till all the related expressions are examined.

Notes at the end of Lecture XVI.

Blackstone's absolute rights, vi. 123. His confusion of Right, as meaning conformity with a rule, and of Right, as correlating with duty. Vol. I. 122.

There is no general definition of a Right by the Classical Jurists.

The following passage from Ulpian is in the Digests:

"Totum autem jus consistit aut in acquirendo, aut in conservando, aut in minuendo. Aut enim hoc agitur, quemadmodum quid cujusque fiat; aut quemadmodum quis jus suum conservet; aut quomodo amittat." But this passage relates, not to the definition of a right, but to the modes wherein rights are acquired, preserved, or lost.

The definition of a Right is not given in any one part of the *Corpus Juris*, but extends through three: Primary Rights; Violations; and Sanctions. The first adumbrates in generals; the second limits and enlarges, so as to correct the generality of the first; the third describes the Sanction.—*Marginal Note in Falck's Jurist. Encyc.* p. 31.

Recht und Gerechtigkeit.

"Das deutsche Hauptwort Recht hat, wie das lateinische, *jus*, eine zweifache Bedeutung. 1° Im objectiven Sinne versteht man darunter diejenigen *Regeln* und *Vorschriften*, welche die Menschen als vernünftig sinnliche Wesen in ihren gegenseitigen Verhältnissen zu einander, als die Norm ihrer freien Handlungen zu beobachten haben. Dasjenige, *was mit diesen Vorschriften übereinstimmt*, bezeichnen wir mit dem Beiworte *recht* (justum *sive rectum*)* und die auf dem innern eignen Antriebe des Menschen und auf seiner Neigung zum Guten beruhende Übereinstimmung der Handlungen desselben, nicht den Vorschriften des Rechts, heisst Gerechtigkeit (*justitia*). 2° Im subjectiven Sinne hingegen, bedeutet Recht so viel als Befügniss zu handeln, oder die moralische Möglichkeit entweder etwas selbst thun zu dürfen, oder zu verlangen, dass ein Anderer zu unserm Vortheil etwas

* Right as opposed to Wrong.—*Marginal Note.*

thue oder unterlasse.* Hier zeigt es also das günstige Verhältniss eines Menschen zu einem Andern an, und ist gleichbedeutend mit demjenigen, was wir auch wohl Gerechtsame oder Gerechtigkeit in diesem Sinne zu nennen pflegen."—*Mackeldey, Lehrbuch des heutigen römischen Rechts*, p. 1.

"Jus vocamus conditionem *facultatemque faciendi aut non faciendi*. Ex quo nascitur ut juri semper respondet aliorum *officium*; idque aut commune est *omnium*, quod eo solo cernitur, ut ne quis alterum lædat; aut *certorum* hominum proprium, scilicet ex eo jure oriundum, quo singuli singulis obstringuntur.

"Atque juris *quidem vis omnis in cogendi potestate posita est*, eâque aut *perfectâ*, quæ actionibus maxime continetur, aut imperfectâ quæ defensionibus tantum. Omnino autem *hæc sunt sine quibus esse nequit jus*, et *persona* in quam cadere potest jus et *materia* juris legitima, et *causa* juri constituendo idonea."—*Mühlenbruch, Doctrina Pandectarum*, vol. i. Lib. ii.

"Jedes Recht führt als solches die Möglichkeit des Zwanges mit sich; entweder um den Verpflichteten zu positiven Handlungen zu nöthigen, oder ihn davon abzuhalten."—*Thibaut, System des Pandecten-Rechts*, vol. i. p. 44.

* Right as opposed to obligation. Necessitas, officium. Potestas et officium: jus in personam et obligatio.—*Marginal Note.*

LECTURE XVII.

In my last Lecture, I attempted to settle the import of the term "Right," considered as an expression embracing *all* rights, or considered as an expression for rights *in abstract*, or without regard to their generic and specific differences.

Import of "Right" *in abstract.*

The import of the term "Right," as thus considered, may (I think) be expressed briefly, in the following manner.

A monarch or sovereign body expressly or tacitly *commands*, "that one or more of its subjects shall do or forbear from acts, towards, or in respect of, a distinct and *determinate* party."* The person or persons who are to do or forbear from these acts, are said to be subject to a *duty*, or to lie under a *duty*. The party *towards* whom those acts are to be done or forborne, is said to have a *right*, or to be invested with a *right*.

Consequently, the term "right" and the term "*relative* duty" are correlating expressions. They signify the same notions, considered from different aspects, or taken in different series. The acts or forbearances which are expressly

* In the case of the negative duties corresponding to *jus in rem*, it is not necessary to *take into consideration* any determinate or assigned party. The parties on whom the duty is incumbent, are restricted to "persons within the jurisdiction of the sovereign;" consequently, to persons determined generically. In every case of a right, and of an *obligation* (*sensu Romano*) the party having the right, or the party bound by the obligation, is assignable individually or generically, or both: And *must be considered* as assigned individually.

or tacitly enjoined, are the objects of the right as well as of the corresponding duty. But with reference to the person or persons commanded to do or forbear, a duty is imposed. With reference to the opposite party, a right is conferred.

Duties are relative or absolute.

As I intimated at the outset of the analysis through which I am now journeying, duties may be distinguished into *relative* and *absolute*.*

A relative duty is incumbent upon one party, and correlates with a right residing in another party. In other words, a relative duty answers to a right; or implies, and is implied by, a right.

Where a duty is absolute, there is no right with which it correlates. There is no right to which it answers. It neither implies, nor is it implied by, a right.

Now the term "absolute" is a negative expression. It signifies the *absence* of some object to which the speaker or writer expressly or tacitly refers. As applied to a duty, it denotes that the duty in question has *no* corresponding right.

But, in order to the complete explanation of a negative expression, we must first explain the object of which it signifies the absence. Accordingly, I have attempted to explain "Right" (and "duty" as correlating with "right"), and now proceed to the duties which have *no* corresponding rights, or which (in a word) are *absolute*.

Absolute duties defined by exhaustive enumeration.

Every legal duty (like every legal right) emanates from sovereign will. It flows from the command (express or tacit) of a monarch or sovereign body. And the party upon whom it is imposed is said to be legally obliged, because he is obnoxious or liable to those

* For "absolute duties," see 'Traités de Législation,' i. 154, 305, 247. 'Principles of Morals and Legislation,' pp. 222, 289, 308.

Blackstone's "absolute duties" are moral or religious duties. Vol. iv. ch. 41.

means of compulsion or restraint which are wielded by that superior.

Every duty is a duty to do or forbear. A duty is relative, or answers to a right, where the sovereign commands that the acts shall be done or forborne towards a *determinate* party, *other* than the obliged. All other duties are absolute.

Consequently, a duty is absolute in any of the following cases: 1st, where it is commanded that the acts shall be done or forborne towards, or in respect of, the party to whom the command is directed. 2dly, Where it is commanded that the acts shall be done or forborne towards or in respect of parties *other* than the obliged, but who are not *determinate* persons, physical or fictitious. For example, towards the members generally of the given independent society; or towards mankind at large. 3dly, Where the duty imposed is not a duty towards *man;* or where the acts and forbearances commanded by the sovereign, are not to be done or observed towards a *person* or *persons.* 4thly, Where the duty is merely to be observed towards the sovereign imposing it: *i.e.* the monarch, or the sovereign number in its collegiate and sovereign capacity.

Order in which I shall consider absolute duties in the present Lecture.

I think that this enumeration completely exhausts the cases wherein duties or obligations can be considered absolute. Accordingly, for the purpose of explaining and exemplifying the general nature of those duties, I shall consider them in the order which I have now announced. Though I should probably arrange them in another order, if I attempted to expound them in detail.

Self-regarding duties, and duties *not regarding man*, regard persons generally in respect of their remote purpose.

But before I endeavour to explain and exemplify the classes of absolute duties, I will briefly advert to a topic upon which I may insist hereafter.

I have said that some of these duties are self-regarding: that is to say, that the acts or for-

bearances which the Law enjoins are to be done or observed by the party obliged towards or in respect of himself.

I have said that others of these duties are not duties towards *man*: that is to say, that the acts or forbearances, enjoined by the Law, are not to be done or observed towards *persons*, or towards human creatures.

But in styling some of these duties self-regarding, and in affirming of others of these duties "that they are not duties towards man," I look exclusively at their immediate or proximate scope.

Considered with reference to their more remote purposes, they are absolute duties regarding persons generally. For, assuming that they are imposed at the suggestions of general Utility, they regard the members generally of the given political society, or they regard mankind at large: so far, that is, as Laws, established in a given community, can promote or contemplate an end so vague and uncertain as the weal of human kind.

For example, the duty incumbent upon you to forbear from suicide, is a self-regarding duty, in respect of its proximate purpose. It is imposed directly, to the end of deterring you from destroying your own life. But remotely or indirectly, it is an absolute duty regarding persons generally. For it is partly imposed for the purposes of preserving a member to the community, and of deterring its members generally from the act of suicide by the consequences annexed to the act, in the single or particular instance.

Again: A duty to forbear from cruelty towards the lower animals, is not a duty towards *man* in respect of its proximate scope. Its proximate or direct scope, is to save the lower animals from needless suffering: from suffering which has no tendency to promote the good of man, or decidedly outweighs the good which man can derive from it. But, in respect of its remote purposes, the duty is an absolute duty regarding *persons* indefinitely. For tending to preserve and cherish the sentiment of benevolence or sympathy, it

tends to the good of the community, and to the good of mankind at large.

Relative duties regard persons generally, in respect of their remote purpose.

Nor does this apply exclusively to those *absolute* duties, which I have styled (for the sake of distinction) self-regarding, or of which I have affirmed (for the same purpose) "that they are not duties towards man."

It also applies to relative duties, or to duties which correlate with rights.

In numerous instances, rights are conferred (and their correlating duties imposed) with the direct or immediate purpose of promoting the general good: (as, for example, the rights of judges and other political subordinates): And rights are conferred indirectly to the same extensive purpose, although their proximate end be the advantage of the parties entitled, or of other determinate parties for whom they are conferred in trust.

For example, The immediate purpose of a right of property, is either the advantage of the proprietor himself, or of some determinate party for whom he is a Trustee. But the ulterior or remote end for which such rights are conferred, is the advantage of the community at large. Consequently, absolute duties, and duties correlating with rights, are not distinguishable when viewed from a certain aspect. Considered in respect of their ultimate or remote scope, all duties regard persons generally.

Duties towards persons generally, are, indirectly, duties towards determinate persons.

And as duties which regard *directly* determinate or assigned persons, regard *indirectly* persons generally and indefinitely, so is the converse of the proposition equally true. That is to say, duties which regard *directly* persons considered generally, regard *indirectly* determinate persons. For as the general or public interest is an aggregate of individual interests, duties which tend to promote the good of the general or whole, tend to promote the good of its several or single members.

In order that we may conceive correctly many important distinctions, it is necessary that we should conceive precisely the truths which I have now stated.*

For example, the Roman Lawyers, and most writers upon Jurisprudence, divide Law into Public and Private. According to the Roman Lawyers, Public Law is that, "quod ad *publice* utilia spectat." Private Law is that department of the whole, "quod ad *singulorum* utilitatem—ad *privatim* utilia—spectat." Jus Publicum et Privatum.

But this, it is manifest, is *not* the *ground* of the intended distinction. For since the general interest is an aggregate of individual interests, Law regarding the former, and Law regarding the latter, regard the same subject. In other words, the terms "public" and "private" may be applied indifferently to *all* Law. Which is as much as to say, that the distinction in question is a distinction without a difference.

It is manifestly impossible to distinguish the two departments by a property common to both. I shall endeavour, hereafter, to analyze the distinction.

Briefly stated, the distinction between Public and Private Law is this. The former regards persons as bearing political characters. The latter regards persons who have no political characters, and persons also who have them as bearing different characters. In a word, Public Law is the law of political *Status;* and, instead of standing opposed to the body of the law, is a branch of one of its departments: namely, of the Law of Persons. In which light it was justly considered by Hale; and, after Hale, by Blackstone.

Again: Civil Injuries and Crimes are distinguished by Blackstone and others in the following manner.* Civil Injuries are *private* wrongs and concern individuals only. Crimes are *public* wrongs and affect the whole community. Civil Injuries, and Crimes.

If Blackstone had but reflected on his own catalogue of

* Blackstone, vol. iv. 5, 43, 176.

crimes, he must (I think) have seen, that this is not the basis of the capital distinction in question. For the greater half of them are offences against rights. In other words, they are violations of duties regarding determinate persons, and therefore affect individuals in a direct or proximate manner. Such, for instance, are offences against life and body: murder, mayhem, battery, and the like. Such, too, are theft and other offences against property.

But independently of this, Blackstone's statement of the distinction is utterly untenable.

All offences affect the community, and *all* offences affect individuals. But though all affect individuals, some are not offences against *rights*, and are therefore pursued, of necessity, criminally. That is to say, they are pursued directly by the Sovereign, or by some subordinate representing the Sovereign.

Where the offence is an offence against a *right*, it *might* be pursued (in all cases) either by the injured party, or by those who represent him. But, for reasons which I shall explain at large when I arrive at the distinction in question, it is often thought expedient to convert the offence into a crime. That is to say, the pursuit of it is not left to the discretion of the injured party or his representatives, but is assumed by the Sovereign or by the subordinates of the Sovereign. The differences between Crimes and Civil Injuries, is not to be sought for in a supposed difference between their tendencies, but in the difference between the modes wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offence which is pursued at the discretion of the injured party or his representative, is a Civil Injury. An offence which is pursued by the Sovereign or by the subordinates of the Sovereign, is a Crime.

In many cases (as in cases of Libels and Assaults), the same offence belongs to both classes. That is to say the injured has a remedy which he applies or not as he likes,

and the Sovereign reserves the power of visiting the offender with punishment.

That the distinction should have been referred to supposed differences of tendencies, is wonderful. For, in different countries, the line between civil and criminal is utterly different. In almost all rude societies, the domain of Criminal Law is extremely narrow :* and, for reasons which I shall show hereafter, it generally enlarges as society advances.

The distinction does not consist in this: that the mischief of crimes (as a class) is more extensive than that of civil injuries (as a class). But in this; the different tendencies of Civil or Criminal Procedure as applied in certain cases.

Difference between relative and absolute duties, etc.

It follows from what has been premised, that in distinguishing relative from absolute duties, and in distinguishing the kinds of the latter, we must not look to the ultimate scope or purpose with which duties are imposed. For, as that is the same in all cases, it can never enable us to draw the distinctions in question.

A relative duty corresponds, as I have said, to a right: *i.e.* it is a duty to be fulfilled towards a *determinate person* or *determinate persons*, other than the obliged, and other than the Sovereign imposing the duty. All other duties are absolute.

[All duties are duties towards the Sovereign, and, as towards the Sovereign, are relative. By "relative," therefore, as applied to a duty, I mean a duty correlating with a right. By "absolute," as applied to a duty, I mean not a duty without relations, but without relation to a right.]

All absolute obligations are sanctioned criminally: they do not correspond with rights in the Sovereign, the Public,

* Instances: Rome; ("*furtum*," etc.) England (Anglo-Saxon); ("*Were-gild.*") Old Germany. In the latter country, there was hardly any criminal law. Merely so much as to give effect to civil proceedings: *e.g.* In cases of offences against the Government and the Minister of Justice. This was necessarily the case: because the Sanction of Sanctions is always Punishment.

etc.* They do not correspond with rights at all. But rights to enforce, exist in persons delegated by the Sovereign.

e.g. In England, offences against absolute duties, like all other crimes, are said to be offences against the King, because it is part of his office to pursue those offences as well as other crimes.†

Distinctions between absolute duties.

Absolute duties are distinguishable by their proximate or immediate purposes.

The proximate purpose of some is the advantage of the party obliged. And these I style self-regarding.

The proximate purpose of others is the advantage of persons indefinitely: for instance, of the community at large, or of mankind in general.‡

The proximate purpose of others is not the advantage of *any* person or persons.

I shall adduce examples of them in that order.

Duties towards self.

Violations of these duties: Drunkenness.§ Suicide.‖ Fornication, or simple breach of chastity, not accompanied by violation of a right residing in another, as by adultery, rape, seduction. (Rape includes injury to the party ravished, and to others who have an interest, etc.)

There can be no *right* as against self. The end of a right is, that a party may be obliged by a sanction to do or to for-

* For examples of breaches of absolute obligations, see Blackstone, vol. iv. c. II. p. 150, Libel; Smuggling, p. 154; Usury, p. 156; Forestalling, p. 158; Breach of prison, escape, etc., p. 129; Champerty, etc., p. 134; Quarantine, p. 161; Polygamy, p. 162. Other examples, pp. 115–127.

Most of the offences styled *præmunire* are breaches of obligations towards society at large.

† Blackstone, i. 268; iii. 40; iv. 88.

‡ "Il y a bien des cas où la partie favorisée (the party on whom a right is conferred) n'est que le public entier, et non pas un individu."—*Traités de Législ.* vol. i. p. 305.

"In this case, the only persons invested with corresponding rights are, persons clothed with powers In Trust for the Government."—*Marginal Note.*

§ Blackstone, p. 64. ‖ Blackstone, p. 188.

bear, towards a determinate person or persons. But the act or forbearance, in this instance, depends upon the pleasure of the party. To give him a right to an act or forbearance to which he himself is bound, were absurd.

Duties towards persons indefinitely, or towards the sovereign imposing the duty.

Treason* is properly an offence against the Sovereign. But an offence against a member of a sovereign body is often so considered.†

Duties not regarding persons.

Towards God: (Ascetic observances.) (Blackstone, vol. iv. p. 43.)

Towards the lower animals.

The Deity, an infant, or one of the lower animals, *as being the party towards whom a duty is to be performed*, might be said to have a right. But so, in the same case, might an inanimate thing. To call the Deity a person, is absurd.

* Blackstone, iv. 81.

† Offences against rights residing in *members* of sovereign powers, may be considered breaches of relative duties.

LECTURE XVIII.

Brief review of preceding Lectures.

In a former Lecture I entered upon the analysis and explanation of the term "Rights:" Meaning by "rights," *legal* rights; or rights which owe their being to the express or tacit commands of Monarchs or Sovereign bodies.

Now all that can be affirmed of rights *considered in abstract* (—or all that can be affirmed of rights *apart from their kinds and sorts*), amounts to a brief and barren generality, and may be thrust into a single proposition, or into a few short propositions.

But before I could shew the little which can be affirmed of rights in abstract (—or before I could shew *how* little can be affirmed of rights in abstract), it was necessary that I should advert to *persons*, as *bearing* rights and duties; to *things* and *persons*, as *subjects* of rights and duties; to *acts* and *forbearances*, as *objects* of rights and duties; and to a certain capital *distinction* which obtains between rights themselves.

Accordingly, In the last four Lectures I called your attention to the following *leading* topics; and to numerous *subordinate* topics, with which they are inseparably connected, or which they naturally suggest:

1st, *Persons*, as invested with rights, and as lying under duties.

2ndly, *Things*, as subjects of rights, and of duties answering to rights.

3rdly, *Persons*, as placed in a position *analogous* to the

position of *things:* That is to say, *not* as invested with rights, or as lying under duties, but as the subjects or matter of rights residing in *other* persons, and availing against strangers or *third* persons.

4thly, *Acts* and *forbearances*, as objects of rights, and of duties corresponding to rights.

5thly, and lastly, The *distinction* between the rights which avail against persons *generally*, and the rights which avail against persons *certain* or *determinate*:—A distinction which the Classical Jurists denoted by the opposed expressions, "*Dominium* et *Obligatio;*" but which numerous modern Civilians (and writers upon general jurisprudence) have marked with the more adequate and less ambiguous expressions, "Jus *in rem* et Jus *in personam.*"

In reviewing these various topics (and, especially, the principal *kinds* into which rights are divisible), I endeavoured to prepare the way for such a definition of "Right" as might rest upon a *sufficient induction:* as might apply indifferently to *every* right; or might apply to *any* right, without regard to its class. Accordingly, I proceeded to examine the import of the term "Right," considered as an expression for *all* rights, or for rights abstracted from the generic and specific differences by which their kinds and sorts are separated or distinguished. And, in attempting to settle the import of the term "Right," I considered implicitly the general nature of the duties which I style "*relative:*" that is to say, which correlate with *rights*, or answer to corresponding *rights.*

But, besides the Duties which I style "relative," there are numerous duties which have *no* corresponding rights, or *no* rights wherewith they correlate: And as the Analysis through which I am journeying embraces *Duties* as well as Rights, it was necessary that I should advert to duties *without* corresponding rights, as well as to duties which are *relative.*

Accordingly, the class of duties in question (which I dis-

tinguish from *relative* duties by the negative epithet "*absolute*") were also considered in the last lecture.

Every legal duty (—whether it be relative or absolute, or whether it be *obligatio* or *officium*,) is a duty to do (or forbear from) an outward act or acts, and flows from the Command, (signified expressly or tacitly) of the person or body which is *sovereign* in some given society.

To fulfil the duty which the command imposes, is *just* or *right*. That is to say, the party does the act, or the party observes the forbearance, which is *jussum* or *directum* by the author of the command.*

To omit (or forbear from) the act which the command enjoins, or to do the act which the command prohibits, is a wrong or *injury*:—A term denoting (when taken in its

* *Just* is that which is *jussum*; the past participle of *jubeo*.

Right is derived from *directum*; the past participle of *dirigo*: or, rather, *right* is probably derived from some Anglo-Saxon Verb, which comes with *dirigo* from a common root. The German *recht, gerecht, richtig, rechtens* (*just*) is from the obsolete *richten* or *rechten* (dirigo). Hence *Richter*, a judge. Latin; *Rego, Rex, Regula, Rectum.* (Wrong = Wrung; the opposite of rectum.)

And as *just* and *right* signify that which is commanded, so do the Latin *Æquum* and the Greek *Dikaion* denote that which conforms to a law or rule. Manifestly, a metaphor borrowed from measures of length. Something equal to, or even with, a something to which it is compared. Æquum = jus gentium.

The abstracts, *justice,—justum, dikaion*, equity, etc., denote conformity to Command; as their corresponding concretes denote a something which is commanded, or equal.

Distinction between *right* as denoting something commanded, and as denoting the position of the party *towards* whom it is commanded. To *do* right, is to obey a command. 'To *have* a right,' is to be placed in such a position that another is commanded to do or forbear towards or in respect of oneself.

In consequence of the intimate connexion between the terms, right and obligation are often used indifferently. *E.g.* In old German Law language, *recht* denotes either. So in vulgar English. So the Latin *jus* and *obligatio*. The French *droit*, and the Italian *dritto*, are free from this ambiguity. The Greek *exousia* is equivalent to *facultas, potestas*.

largest signification) every act, forbearance, or omission, which amounts to disobedience of a Law (or to disobedience of any other command) emanating directly or circuitously from a Monarch or Sovereign Number.—"Generaliter injuria dicitur, *omne* quod *non jure* fit."

A party lying under a duty, or upon whom a duty is incumbent, is liable to evil or inconvenience (to be inflicted by sovereign authority), in case he disobey the Command by which the duty is imposed. This conditional evil is the *Sanction* which enforces the duty, or the duty is *sanctioned* by this conditional evil: And the party bound or obliged, *is* bound or obliged, *because* he is obnoxious to this evil, in case he disobey the command.—That bond, *vinculum*, or *ligamen*, which is of the essence of *duty*, is, simply or merely, liability or *obnoxiousness* to a *Sanction*.

Now it follows from these considerations, that, before I can complete the analysis of legal *right* and *duty*, I must advert to the nature or essentials of legal Injuries or Wrongs, and of legal or political Sanctions.—As Person, Thing, Act and Forbearance, are inseparably connected with the terms "Right" and "Duty," so are Injury and Sanction imported by the same expressions.

Obligation, Injury, and Sanction imply Motive, Will, Intention, Negligence, and Rashness.

But before we can determine the import of "Injury" and "Sanction" (or can distinguish the compulsion or restraint, which is implied in Duty or Obligation, from that compulsion or restraint which is merely physical), we must try to settle the meaning of the following perplexing terms: namely, Will, Motive, Intention, and Negligence:—*In*cluding, in the term "Negligence,"—those *modes* of the corresponding complex notion, which are styled "Temerity" or "Rashness, Imprudence or Heedlessness."

Accordingly, I shall now endeavour, to state or suggest the significations of "Motive" and "Will." In other

words, I shall attempt to distinguish desires, as *determining* to acts or forbearances, from those remarkable desires which are named *volitions*, and by which we are not *determined* to acts or forbearances, although they are the immediate antecedents of such bodily movements, as are styled (strictly and properly) human *acts or actions*.

Apology for inquiry into "Motive," "Will," etc.

Nor is this incidental excursion into the Philosophy of Mind a wanton digression from the path which is marked out by my subject.

For (first) the party who lies under a duty is bound or obliged by a *sanction*. This conditional evil determines or inclines his *will* to the act or forbearance enjoined. In other language, he wishes to avoid the evil impending from the Law, although he may be averse from the fulfilment of the duty which the Law imposes upon him.

Consequently, if we would know precisely the import of "Duty," we must endeavour to clear the expressions "Motive" and "Will" from the obscurity with which they have been covered by philosophical and popular jargon.

2ndly, The *objects* of duties are acts and forbearances. But every act, and every forbearance from an act, is the consequence of a volition, or of a determination of the will. Consequently, if we would know precisely the meaning of act and forbearance, and, therefore, the meaning of duty or obligation, we must try to know the meaning of the term "Will."

3rdly, Some injuries are *intentional*. Others are consequences of *negligence* (in the large signification of the term). Consequently, if we would know the nature of injuries or wrongs, and of various important differences by which they are distinguished, we must try to determine the meanings of "Intention" and "Negligence."

It is absolutely necessary that the import of the last-mentioned expressions should be settled with an approach to precision. For *both* of them run, in a continued vein, through the doctrine of injuries or wrongs; and of the

rights and obligations which are begotten by injuries or wrongs. And *one* of them (namely, "Intention"), meets us at *every* step, in *every* department of Jurisprudence.

But, in order that we may settle the import of the term "Intention," we must settle the import of the term "Will." For, although an intention is not a volition, the facts are inseparably connected. And, since "Negligence" implies the *absence* of a *due* volition and intention, it is manifest that the explanation of that expression supposes the explanation of these.

Accordingly, I will now attempt to analyze the expressions "Will" and "Motive."

The Will.

Certain parts of the human body obey the *will*. Changing the expression, certain parts of our bodies move in certain ways, so soon as we *will* that they should. Or, changing the expression again, we have the *power* of moving in certain ways, certain parts of our bodies.

Now these expressions, and others of the same import, merely signify this:

Certain movements of our bodies follow invariably and *immediately* our wishes or desires for those *same* movements: Provided, that is, that the bodily organ be sane, and the desired movement be not prevented by an outward obstacle or hindrance. If my arm be free from disease, and from chains or other hindrances, my arm rises, so soon as I wish that it should. But if my arm be palsied, or fastened down to my side, my arm will not move, although I desire to move it.

These antecedent wishes and these consequent movements, are human *volitions* and *acts* (strictly and properly so called). They are the only objects to which those terms will strictly and properly apply.

But, besides the antecedent desire (which I style a *volition*), and the consequent movement (which I style an *act*), it is commonly supposed that there is a certain "*Will*"

which is the cause or author of both. The desire is commonly called an act of the *will;* or is supposed to be an effect of a *power or faculty of willing*, supposed to reside in the man.

That this same "*will*" is just nothing at all, has been proved (in my opinion) beyond controversy by the late Dr. Brown: Who has also expelled from the region of entities, those fancied beings called "*powers*," of which this imaginary "*will*" is one. Many preceding writers had stated or suggested generally, the true nature of the relation between cause and effect. They had shewn that a *cause* is nothing but a given event invariably or usually *preceding* another given event; that an *effect* is nothing but a given event invariably or usually *following* another given event; and that the *power* of *producing* the effect which is ascribed to the cause, is merely an abridged (and, therefore, an obscure) expression for the customary antecedence and sequence of the two events. But the author in question, in his analysis of that relation, considered the subject from numerous aspects equally new and important. And he was (I believe) the first who understood what we would be at, when we talk about the *Will*, and the *power or faculty of willing*.

All that I am able to discover when I *will* a movement of my body, amounts to this: I *wish* the movement. The movement *immediately* follows my wish of the movement. And when I conceive the *wish*, I *expect* that the movement wished *will* immediately follow it. Any one may convince himself that this is the whole of the case, by carefully observing what passes in himself, when he *wills* to move any of the bodily organs, which are said to obey the *will*, or the *power* or *faculty* of willing.

For further proof, I must refer you to Brown's 'Analysis of Cause and Effect.'* A detailed exposition of the subject,

* Brown's Enquiry into the Relation of Cause and Effect. For the Will in particular, Part 1, Section 3.

Mill's Analysis of the Phenomena of the Human Mind. Cap. 24, 25.

were utterly inconsistent with the limits by which I am confined, and with the direct or appropriate purpose of these Lectures.

Dominion of the will limited to bodily organs.

The wishes which are immediately followed by the bodily movements wished, are the only wishes *immediately followed by their objects.* Or (changing the expression), they are the only wishes which *consummate themselves*:—The only wishes which attain their *ends* without the intervention of *means.*

In every other instance of wish or desire, the object of the wish is attained (in case it be attained) through a *mean*; and (generally speaking) through a *series* of means:—Each of the means being (in its turn) the object of a distinct wish; and each of them being wished (in its turn) as a step to that object which is the end at which we aim.

For example, If I wish that my arm should rise, the desired movement of my arm immediately follows my wish. There is nothing to which I resort, nothing which I wish, as a mean or instrument wherewith to attain my purpose. But if I wish to lift the book which is now lying before me, I wish certain movements of my bodily organs, and I employ these as a mean or instrument for the accomplishment of my ultimate end.

Again: If I wish to look at a book lying beyond my reach, I resort to certain movements of my bodily organs, coupled with an additional something which I employ as a *further* instrument. For instance, I grasp and raise the book now lying before me; and *with* the book which I grasp and raise, I get the book which I wish to look at, but which lies on a part of the table beyond the reach of my arm.

Dominion of the will limited to *some* bodily organs.

It will be admitted by all (on the bare statement) that the dominion of the will is limited or restricted to *some* of our bodily organs: that is to say, that there are only *certain parts* of our bodily frames, which change their actual states for different states, *as* (and so *soon* as) we wish or desire that they should. Number-

less movements of my arms and legs immediately follow my desires of those same movements. But the motion of my heart would not be immediately affected, by a wish I might happen to conceive that it should stop or quicken.

Dominion of the will extends not to the mind.

That the dominion of the will extends not to the mind, may appear (at first sight) somewhat disputable. It has, however, been *proved* by the writers to whom I have referred. Nor, indeed, was the proof difficult, so soon as a definite meaning had been attached to the term *will*. Here (as in most cases) the confusion arose from the indefiniteness of the language by which the *subjects* of the inquiry were denoted.

If volitions be nothing but wishes immediately followed by their objects, it is manifest that the mind is not obedient to the will. In other words, it will not change its *actual*, for *different* states or conditions, *as* (and so *soon* as) it is wished or desired that it should. Try to recall an absent thought, or to banish a present thought, and you will find that your desire is not immediately followed by the attainment of its object. It is, indeed, manifest, that the attempt would imply an absurdity. Unless the thought desired be present to the mind *already*, there is no determinate object at which the desire aims, and which it can attain *immediately*, or without the intervention of a mean. And to desire the absence of a thought actually present to the mind, is to *conceive* the thought of which the absence is desired, and (by consequence) to perpetuate its presence.

Changes in the state of the mind, or in the state of the ideas and desires, are not be attained immediately by desiring those changes, but through long and complex series of intervening means, beginning with desires which *really* are *volitions*.*

Volitions, what.

Our desires of those bodily movements which immediately follow our desires of them, are therefore the only objects which can be styled *volitions*; or (if you like

* Examples: Taking up a book to banish an importunate thought. Looking into a book to recover an absent thought.

the expression better) which can be styled acts of the will. For that is merely to affirm, "that they are the only desires which are followed by their objects *immediately*, or without the intervention of means." They are distinguished from other desires by the name of *volitions*, on account of *this*, their essential or characteristic property.

Acts, what.

And as these are the only *volitions*; so are the bodily movements, by which they are immediately followed, the only *acts* or *actions* (properly so called). It will be admitted on the mere statement, that the only objects which can be called acts, are consequences of Volitions. A voluntary movement of my body, or a movement which follows a volition, is an *act*. The *in*voluntary movements which are the consequences of certain diseases, are *not* acts. But as the bodily movements which immediately follow volitions, are the only *ends* of volition, it follows that those bodily movements are the only objects to which the term "acts" can be applied with perfect precision and propriety.

Names of acts comprise certain of their consequences.

The only difficulty with which the subject is beset, arises from the concise or abridged manner in which (generally speaking) we express the objects of our discourse.

Most of the names which seem to be names of acts, are names of acts, *coupled with certain of their consequences*. For example, If I kill you with a gun or pistol, I *shoot* you: And the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an *act*, perpetrated by me. In truth, the only parts of the train which are my act or acts, are the muscular motions by which I raise the weapon; point it at your head or body, and pull the trigger. These I *will*. The contact of the flint and steel; the ignition of the powder, the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are *consequences* of the act which I *will*. I *will* not those consequences, although I may *intend* them.

Confusion of will and intention.

Nor is this ambiguity confined to the names by which our *actions* are denoted. It extends to the term "will;" to the term "volitions;" and to the term "acts of the will." In the case which I have just stated, I should be said to *will* the whole train of incidents; although I should only *will* certain muscular motions, and should *intend* those consequences which constitute the rest of the train. But the further explanation of these and other ambiguities, must be reserved for the explanation of the term "intention."

Motive and Will.

The desires of those bodily movements which immediately follow our desires of them, are imputed, (as I have said) to an imaginary being, which is styled the *Will*. They are called *acts of the will*. And this imaginary being is said to be *determined* to action, by *Motives*.

All which (translated into intelligible language) merely means this: I wish a certain object. That object is not attainable *immediately*, by the wish or desire itself. But it is attainable by means of bodily movements which *will* immediately follow my desire of them. For the purpose of attaining *that* which I cannot attain by a wish, I wish the movements which will immediately follow my wish, and *through* which I expect to attain the object which is the end of my desires, (as in the foregoing instance of the book).

Motives to volitions.

A motive, then, is a wish causing or preceding a volition:—A wish for a something not to be attained by wishing it, but which the party believes he shall probably or certainly attain; by *means* of those wishes which are styled acts of the will.

Motives to motives.

In a certain sense, motives may precede motives as well as acts of the will. For the desired object which is said to determine the will may itself be desired as a mean to an ulterior purpose. In which case, the desire of the object, which is the ultimate end, prompts the desire which immediately precedes the volition.

[Give instance.]

That the will should have attracted great attention, is not wonderful. For by means of the bodily movements which are the objects of volitions, the business of our lives is carried on. That the will should have been thought to contain something extremely mysterious, is equally natural. For volitions (as we have seen) are the only desires which consummate themselves: the only desires which attain their objects without the intervention of means.

Why the will has attracted so much attention:

And been thought mysterious.

See Mr. Locke; Chapter on Power and Will.

His mistake was this. He perceived (though obscurely) that we mean by the "will" or by "volitions," desires which consummate themselves, or which are followed immediately by their objects. And if he had asked himself, "*what* desires are attained by merely desiring them?" he would have arrived at the solution reserved for Dr. Brown.

[The following passage in Hobbes is referred to by Mr. Austin]:—

"In Deliberation the last Appetite or Aversion immediately adhering to the action, or to the omission thereof, is that we call the Will; the Act (not the faculty) of Willing. And Beasts that have Deliberation must necessarily also have Will. The Definition of the Will commonly given by the Schools, that it is a rational Appetite, is not good. For if it were, then there could be no voluntary Act against Reason. For a voluntary Act is that which proceedeth from the Will and no other. But if instead of a rational Appetite, we shall say an Appetite resulting from a precedent Deliberation, then the Definition is the same that I have given here. *Will therefore is the last Appetite in Deliberating.* And though we say in common Discourse, a man had a Will once to do a thing that nevertheless he forbore to do; yet that is properly but an Inclination, which makes no Action voluntary; because the action depends not of it, but of the last Inclination or Appetite."—*Leviathan*, p. 28, Edit. 1651.

Fragments.

The objects of wishes or desires are desired simply or absolutely, or they are desired for their effects or consequences. Changing the expression, the objects of wishes or desires are desired as *ends*, or they are desired as *means* to ends.

For example, I may desire money for the sake of the advantages which it would procure; or (by virtue of that process of association which I think it needless to explain) I may wish for money without adverting to those advantages, or to any of the consequences which would follow the attainment of my desire.

And the remark which I have applied to *positive* desires, will also apply to those *negative* desires which are styled *aversions*. I may wish to avoid a given pain in prospect, without carrying my attention beyond that given object. Or I may wish that an event in prospect may not happen, on account of some consequence which would certainly or probably follow it, and from which I am averse.

If we steadily keep in view this simple and obvious truth, I think that we may approach to the true distinctions between Motive, Will, and Intention.

Voluntary.—Double meaning of the word *voluntary*.

First, a voluntary act is any act done in pursuance of a volition; *i. e.* an *act* (*s. s.*) with such of its intentional consequences as are included in its import; *e. g.* submission to punishment, in consequence of a knowledge that resistance would be fruitless.

Secondly, a voluntary act is an act done in consequence of an act of the will, *as determined by certain motives*. This last sense includes several related yet different senses; *e. g.* a voluntary act, as opposed to an act done for a valuable consideration: a voluntary act, as opposed to an act done in apprehension of pain.

Spontaneous. Mr. Bentham says,*

"I purposely abstain from the use of the words *voluntary* and *involuntary*, on account of the extreme ambiguity of their signification. 'By a voluntary act is meant sometimes, any act in the performance of which the will has had any concern at all; in this sense it is synonymous to 'intentional;' sometimes, such acts only, in the production of which the will has been determined by

* 'Principles of Morals and Legislation,' pp. 22, 79, 81.

motives not of a painful nature: in this sense it is synonymous with unconstrained or *uncoerced*; sometimes *such acts only, in the production of which the will has been determined by motives which, whether* of the pleasurable or painful kind, occurred to a man himself, without being suggested by anybody else;* in this sense it is synonymous with *spontaneous*.

"The sense of the word 'involuntary' does not correspond completely to that of the word 'voluntary.' Involuntary is used in opposition to intentional and to unconstrained; but not to spontaneous."

* Or rather, by motives *other* than those which are in question. Good offices proceeding from the Moral Sanction, are, with reference to legal obligation, *spontaneous*.—See Principles, etc., p. 320.—*Marginal Note.*

LECTURE XIX.

In the preceding Lectures, I have endeavoured to analyze the expressions "*legal Right and Duty*," or to determine *generally* the nature or essence of *legal Rights and Duties*.

Before I can complete the analysis of "Right" and "Duty," or before I can determine completely the import of those complex terms, I must advert in a general manner to legal Injuries or Wrongs, and to legal or political Sanctions.

But before I could proceed to the consideration of Injuries and Sanctions, or could distinguish Duty or Obligation from physical compulsion or restraint, it was necessary that I should examine the meaning of "Will" and "Motive," "Intention" and "Negligence:" Including, in the term "Negligence," negligence strictly so called; with the closely allied, though somewhat different notions, which are styled "Rashness" or "Temerity," and "Heedlessness."

Accordingly, I examined, in the last Lecture, the meaning of "Will" and "Motive;" and I now proceed to the import of "Intention" and "Negligence."

Volitions and Motives.

As I stated in my last Lecture, some of our wishes or desires are followed *immediately* by their objects. In other words, some of our wishes or desires consummate themselves, or attain their appropriate *ends* without the intervention of *means*.

The only wishes or desires which consummate themselves, are wishes, or desires for certain movements of our own bodily organs. All our other desires attain their appropriate ends, by means, or series of means: by means of the bodily movements which immediately follow our desires for them, or by means of those bodily movements coupled with additional means.

[The bodily movements which we will, or which immediately follow our desires of them, are not desired for themselves, but for their consequences. They are not desired as *ends*, but as *means* to ends.

This (I believe) will hold universally. The movements in themselves are perfectly indifferent objects, and derive all their interest from the purposes which they subserve.]

The desires for those bodily movements which immediately follow our desires for them, are sometimes styled "*volitions:*"—more frequently, "determinations of the will," or of "the power or faculty of willing." For here (as in other cases of cause and effect) the customary sequence of the bodily movement upon the desire immediately preceding, has been ascribed to a fancied something styled a "power:" A "*power of willing*" which resides in the man, and by *virtue* whereof he *produces* the movement which is the instant consequence of his wish for it. The fancied something which comes between the wish and the movement, is commonly styled (with more brevity) "the Will." And whenever I find occasion to mention this mysterious being, I will (if you please) call it so.

For the structure of established speech forces me to talk of "*willing;*" and to impute the bodily movements, which immediately follow our desires for them, to "*the Will.*"

To discard established terms, is seldom possible; and, where it is possible, is seldom expedient. A familiar expression, however obscure, is commonly less obscure, as well as more welcome to the taste, than a new and strange one. Instead of rejecting conventional terms because they are

ambiguous and obscure, we shall commonly find it better to explain their meanings, or (in the language of Old Hobbes) "to *snuff* them with distinctions and definitions."

Accordingly, I shall talk of "willing;" of "determinations of the will;" and of "motives determining the will." But all that I mean by those expressions, is this. "To *will*," is to *wish* or *desire* certain of those bodily movements which immediately follow our desires of them. A "*determination* of the will," or a "*volition*," is a wish or desire of the sort. A "*motive* determining the will," is a wish *not* a volition, but suggesting a wish which is. The wish styled a "motive," is not immediately followed by its appropriate object: But the bodily movement which is the appropriate object of the *volition*, seems to the party a certain or probable *mean* for attaining the something which is the appropriate object of the *motive*. In case that something be wished as a *mean* to an ulterior object, the wish of the ulterior object is a motive to a *motive;* as the wish of the *intervening* mean is a motive to the *volition*.

Acts. The bodily movements which immediately follow our desires of them, are the only human *acts*, strictly and properly so called. For events which are not *willed*, are not *acts;* and the bodily movements in question are the only events which we *will*. They are the only objects which follow our desires, without the intervention of means.

But as I observed in my last Lecture, most of the names which seem to be names of acts, are names of *acts*, strictly and properly so called, *coupled with more or fewer of their consequences*.

And as the names of *acts* comprise certain of their *consequences*, so it is said that those consequences are *willed*, although they are only *intended*. In the case which I have just supposed, it would be said that I *willed* the consequences of my voluntary muscular movements, as well as the movements themselves.

Nor is it in our power to discard these forms of speech,

although they involve the nature of will and intention in thick obscurity. They are inseparably interwoven with the rest of established language; and if we attempted to change them for new and precise expressions, we should either resort to terms which others would not understand, or to tedious circumlocutions which others would not endure. To analyze, mark, and remember, their complex import, is all that we can accomplish.

Accordingly, I must often speak of "*acts*," when I mean "*acts and their consequences*;" and must often speak of those consequences as if they were *willed*, though, in truth, they are *intended*.

Internal Acts.

And here I must pause a moment for the purpose of correcting a mistake which I made in a former Lecture.

In that Lecture, I distinguished acts into acts *internal*, and acts *external*: Meaning by acts *internal*, volitions or determinations of the will; and meaning by acts *external*, the bodily movements which are the appropriate *objects* of volitions.

I am convinced, on reflection, that the terms are needless, and tend to darken their subjects. The term "volitions," or the term "determinations of the will," sufficiently denotes the objects to which I applied the term "*internal* acts:" And it is utterly absurd (unless we are talking in metaphor) to apply such terms as "act" and "movement" to *mental* phenomena. I, therefore, repudiate the term "*internal* acts;" and, with that term, the superfluous distinction in question. I hastily borrowed the distinction from the works of Mr. Bentham:* A writer, whom I much revere, and whom I am prone to follow, though I will not receive his dogmas with blind and servile submission. Impostors

* "In the second place, acts may be distinguished into *external* and *internal*. By external are meant corporal acts; acts of the body: by internal, mental acts; acts of the mind: Thus, to strike is an external or exterior act: to intend to strike, an internal or interior one."—*Bentham, Principles, etc.*, p. 70.

exact from their disciples "prostration of the understanding," because their doctrines will not endure examination. A man of Mr. Bentham's genius may provoke inquiry; and may rest satisfied with the ample and genuine admiration, which his writings will infallibly extort from scrutinizing and impartial judges.

Intention as regarding present acts, or the consequences of present acts.

The bodily movements which immediately follow our desires of them, are *acts* (properly so called).

But every act is followed by *consequences;* and is also attended by *concomitants,* which are styled its *circumstances.*

To desire the *act,* is to *will* it. To *expect* any of its *consequences,* is to *intend* those consequences.

The act itself is *intended* as well as *willed.* For every volition is accompanied by an expectation or belief, that the bodily movement wished will immediately follow the wish.

A consequence of the act is never *willed.* For none but acts themselves are the appropriate objects of volitions. Nor is it always *intended.* For the party who wills the act, may not expect the consequence. If a consequence of the act be *desired,* it is probably *intended.* But (as I shall show immediately) an *intended* consequence is not always *desired.* Intentions, therefore, regard *acts;* or they regard the *consequences* of acts.

When I will an act, I expect or intend the *act* which is the appropriate object of the volition. And when I will an act, I may expect, contemplate, or intend, some given event, as a certain or contingent *consequence* of the act which I will.

Confusion of Will and Intention.

Hence (no doubt) the frequent confusion of Will and Intention. Feeling *that will implies intention* (or that the appropriate objects of volitions are intended as well as willed), numerous writers upon Jurisprudence (and Mr. Bentham amongst the number) employ "will" and "intention" as synonymous or equivalent terms.

They forget *that intention does not imply will;* or that the appropriate objects of certain intentions are not the appropriate objects of volitions. The agent may not intend a consequence of his act. In other words, When the agent wills the act, he may not contemplate that given event as a certain or contingent consequence of the act which he wills.

A consequence of an act may not be intended.

For example:

My yard or garden is divided from a road by a high paling. I am shooting, with a pistol, at a mark chalked upon this paling. A passenger then on the road, but whom the fence intercepts from my sight, is wounded by one of the shots. For the shot pierces the paling; passes to the road; and hits the passenger.

Now, when I aim at the mark, and pull the trigger, I may not *intend* to hurt the passenger. I may not contemplate the hurt of a passenger as a contingent consequence of the act. For, though the hurt of a passenger *be* a probable consequence, I may not think of it, or advert to it, *as* a consequence. Or, though I may advert to it *as* a possible consequence, I may think that the fence will intercept the shot, and prevent it from passing to the road. Or the road may be one which is seldom travelled, and I may think the presence of a passenger at that place and time extremely improbable.

On any of these suppositions, I am clear of *intending* the harm: Though (as I shall show hereafter) I may be guilty of *heedlessness* or *rashness.* Before *intention* can be defined exactly, the import of those terms must be taken into consideration.

Where the agent *intends* a consequence of the act, he may *wish* the consequence, or he may *not* wish it.

An intended consequence of an act may be *wished* or *not.*

And, if he *wish* the consequence, he may wish it as an *end,* or he may wish it as a *mean* to an end.

And if wished, it may be wished as an *end,* or as a *mean.*

Consequence of an act wished as an *end*.

I will illustrate these three suppositions by adducing examples. But before I exemplify these three suppositions, I will endeavour to explain what I mean, when I say "that a consequence of an act may be wished as an *end*."

Strictly speaking, no external consequence of any act is desired as an *end*.

The end or ultimate purpose of every volition and act is a feeling or sentiment:—is pleasure, direct or positive; or is the pleasure which arises *in*directly from the removal or prevention of pain. But where the pleasure, which (in strictness) is the end of the act, can only be attained through a *given* external consequence, that external consequence is inseparable from the end; and is styled (with sufficient precision) the end of the act and the volition. For example, If you shoot me to death because you hate me mortally, my death is a necessary condition to the attainment of your end. The end of the act, is to allay the deadly antipathy. But the end can only be attained through my death. And my death (which is an intended consequence of the act) may, therefore, be styled the *end* of the act and the volition.

I stated in my last Lecture, that the bodily movements, which are the appropriate objects of volitions, are not desired as *ends*.

But that is true of every outward object which is the object of a desire. This therefore will not distinguish volitions from other desires.

Nor can it be said, that the appropriate objects of volitions are desired as means to ends external, or to remote ends. In mose cases they are. But in some they are not. Namely, dancing, etc., for nothing but the present pleasure.

The true test is, that they are the only desires immediately followed by their appropriate or direct objects.

Concurrence of Motive and Intention.

Where an intended consequence is wished as an *end* or a *mean*, motive and intention concur.

In other words, The consequence intended is also wished; and the wish of that consequence suggests the volition.

Exemplifications of the three foregoing suppositions.

I will now exemplify those three varieties of intention at which I have pointed already.

The varieties are the following:

1st, The agent may *intend* a consequence; and that consequence may be the *end* of his act.

2ndly, He may *intend* a consequence; but he may desire that consequence as a *mean* to an end.

3dly, He may *intend* the consequence, without desiring it.

As examples of these three varieties, I will adduce three cases of intentional killing.

Of the first supposition.

You hate me mortally: And, in order that you may appease that painful and importunate feeling, you shoot me dead.

Now here you *intend* my death: And (taking the word "*end*" in the meaning which I have just explained) my death is the *end* of the act, and of the volition which precedes the act. Nothing but that consequence would accomplish the purpose, which (speaking with metaphysical precision) is the end of the act and the volition. Nothing but that consequence would allay the painful sentiment, of which you purpose ridding yourself when you shoot me. Nothing but that consequence would appease your hate, or satisfy your malice.

Of the second supposition.

Again:—

You shoot me, that you may take my purse. I refuse to deliver my purse, when you demand it. I defend my purse to the best of my ability. And, in order that you may remove the obstacle which my resistance opposes to your purpose, you pull out a pistol, and shoot me dead.

Now here you *intend* my death, and you also *desire* my death. But you desire it as a *mean*, and not as an *end*. Your desire of my death is not the ultimate *motive* suggesting the volition and the act. Your ultimate motive is your

desire of my purse. And if I would deliver my purse, you would not shoot me.

Of the third supposition. Lastly:

You shoot at Sempronius or Styles, at Titius or Nokes, desiring and intending to kill him. The death of Styles is the *end* of your volition and act. Your desire of his death, is the *ultimate motive* to the volition. You contemplate his death, as the probable consequence of the act.

But when you shoot at Styles, *I* am talking with him, and am standing close by him. And, from the position in which I stand with regard to the person you aim at, you think it not unlikely that you may kill *me* in your attempt to kill *him*. You fire, and kill me accordingly. Now here you *intend* my death, without *desiring* it. The *end* of the volition and act, is the death of Styles. *My* death is neither desired as an *end*, nor is it desired as a *mean*: *My* death *subserves not* your end: you are not a bit the nearer to the death of Styles, by killing *me*. But, since you contemplate my death as a probable consequence of your act, you *intend* my death, although you *desire* it not.

Forbearances are intended, but not willed. It follows from the nature of Volitions, that *forbearances from acts* are not *willed*, but *intended*.

To *will*, is to wish or desire one of those bodily movements which immediately follow our desires of them. These movements are the only *acts*, properly so called. Consequently, "To will a forbearance" (—or "to will the absence or negation of an act"), is a flat contradiction in terms.

When I forbear from an act, I *will*. But I will an act *other* than that from which I forbear or abstain: And, knowing that the act which I will, excludes the act forborne, I *intend* the forbearance. In other words, I contemplate the forbearance as a *consequence* of the act which I will; or, rather, as a necessary *condition* to the act which I will. For if I willed the act from which I forbear, I should not will (at this time) the act which I presently will.

For example, It is my duty to come hither at seven o'clock. But, instead of coming hither at seven o'clock, I go to the Playhouse at that hour, conscious that I ought to come hither.

Now, in this case, my absence from this room is *intentional*. I know that my coming hither is inconsistent with my going thither: that, if my legs brought me to the University, they would not carry me to the Playhouse.

If I *forgot* that I ought to come hither, my absence would not be *intentional*, but the effect of *negligence*.

LECTURE XX.

In my last Lecture, I endeavoured to distinguish *acts* (properly so called) from the events which are *consequences* of acts; to shew that *acts* are *intended* as well as *willed;* but that their *consequences* are never *willed,* although they are often *intended.* In short, every forbearance is *intended,* but no forbearance is *willed:* the party wills a something inconsistent with the act forborne, *conscious* that the something which he presently wills, excludes (for the time being) *that* from which he forbears.

Acts are willed *and* intended: Consequences are *intended.*

Forbearances are *intended.*

Motives to forbearances.

The motives to *forbearances* (or, rather, to the *acts* which exclude the acts forborne,) are different in different cases.

Disliking the consequences of the act from which I forbear, I forbear from the act *because* I dislike those consequences. Or without disliking (or positively liking) those consequences, I *prefer* the consequences of the act which I presently will, and which I could not perform unless I forbore from the other.

In the first of these cases, my motive to the act which I presently will, is styled *aversion:* aversion from the act forborne, or (rather) from its probable consequences. But whether the act which I *will* be prompted by preference or aversion, the act which I will, and *not* the forbearance, is the object of the volition itself. "To will nothing," is a flat contradiction in terms.*

* It is not perhaps rigidly true that every forbearance is preceded or accompanied by an *act.*

Forbearances must be distinguished from Omissions.

Forbearances distinguished from Omissions.

A *forbearance* (taking the word in its large signification) is the *not* doing a given act with an *intention* of not doing it. The party *wills* something else, knowing that that which he wills excludes the given act.

An *omission* (taking the word in its large signification) is the *not* doing a given act, without adverting (at the time) to the act which is not done.

The term "forbearance" (as it is often used) is restricted to *lawful* forbearances:—to such as are exacted by duties, or are not inconsistent with duties.

Ambiguities of the terms "Forbearance and Omission;" "*Com*mit and Omit."

The term "omission" (as it is often used) is restricted to *unlawful* or *culpable* omissions:—to such as are breaches of duties.

And, taking the terms in those restricted senses, we have no names for unlawful or culpable forbearances, or for lawful omissions. Not unfrequently, the term "omission" is extended to *all* omissions, and also to *all* forbearances. Or the term "omission" denotes such omissions and forbearances as are unlawful or culpable. And, in either of those cases, the *not* doing, which is unintentional, is confounded with the *not* doing, which is intentional.

"*O*mit" (as opposed to "*com*mit") is also defective or ambiguous. To "*com*mit," is to *do* an act inconsistent with a duty. "To *o*mit," is to omit *unlawfully;* or to omit (or *forbear*) unlawfully. In the first case, *culpable forbearance* is *dropped.* In the last case, culpable forbearance is confounded with *culpable omission.*

I think that the usage of numerous and good writers authorizes the large significations which I attach to the terms in question. At all events, those significations are so clear, precise, and commodious, that I should venture to annex them to the terms, in the teeth of established usage.

Those significations I will repeat.

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"To forbear" is *not* to do, with an *intention* of not doing.

"*A* forbearance," is a *not* doing, with a like intention.

"To omit," is *not* to do, but without thought of the act which is not done.

"*An* omission," is a *not* doing, with a similar absence of consciousness.

If we would denote, "that a forbearance or omission is a breach of duty," we can easily accomplish the purpose by express restriction. We can style it "injurious" or "unlawful," or we can call it "culpable." Injurious or culpable omissions are frequently styled "negligent." The party who omits, is said to "*neglect*" his duty. The omission is ascribed to his "*negligence*." The state of his mind at the time of the omission, is styled "*negligence*."

Negligence.

These (I think) are the meanings usually attached to these terms; although the Roman Lawyers (as I shall shew immediately) have given them a larger signification.

Taking them in the meanings which (I believe) are usual, the term "negligent" applies exclusively to injurious omissions:—to breaches by omission of positive duties. The party omits an act to which he is *obliged* (in the sense of the Roman Lawyers). He performs not an act to which he is obliged, because the act and the obligation are absent from his mind.

Heedlessness. "*Heedlessness*" differs from negligence, although they are closely allied.*

The party who is negligent *omits* an act, and breaks a *positive* duty:

The party who is heedless *does* an act, and breaks a *negative* duty.

Acts (properly so called) are not injuries or wrongs, independently of their consequences. Where an act is forbidden, the duty and the sanction are pointed at consequences which constantly or usually follow it. And (as I shall shew hereafter) the guilt or innocence of a given actor,

* Bentham, "Principles," etc. pp, 86, 161.

depends upon the state of his consciousness, with regard to those consequences, in the given instance or case.

If he intend or expect them, he is guilty of the wrong at which the sanction is aimed. And, though he expect them not, they are rationally imputed to him, provided he *would* have expected them, if he had thought of *them* and of his duty. Where he does the act without adverting to those consequences, he is clear of *intending* those consequences, but he produces them by his *heedlessness*.

I endeavoured in my last Lecture to illustrate my meaning, by an example to which I now refer you.* In the case supposed, I did not advert to the probable consequence of my act. And, since it was my duty to advert to it, I am guilty of *heedlessness*, although I am clear of *intentional* injury.

Negligence and Heedlessness compared.

The states of mind which are styled "Negligence" and "Heedlessness," are precisely alike. In either case, the party is inadvertent. In the first case, he does *not* an act which he was bound to do, because he adverts not to it. In the second case, he *does* an act from which he was bound to forbear, because he adverts not to certain of its probable consequences. Absence of a thought which one's duty would naturally suggest, is the main ingredient in each of the complex notions which are styled "negligence" and "heedlessness."

Rashness.

The party who is guilty of Temerity or Rashness, like the party who is guilty of heedlessness, does an act, and breaks a positive duty. But the party who is guilty of heedlessness thinks not of the probable mischief. The party who is guilty of rashness *thinks* of the probable mischief; but, in consequence of a missupposition begotten by insufficient advertence, he assumes that the mischief will not ensue in the given instance or case. Such (I think) is the meaning invariably attached to the expressions, "Rashness," "Temerity," "Fool-hardiness," and the like. The ra-

* See Lecture XIX. p. 95.

dical idea denoted is always this. The party runs a risk of which he is conscious; but he thinks (for a reason which he examines insufficiently) that the mischief will probably be averted in the given instance.

I will again illustrate my meaning, by recurring to the example to which I have just alluded.

When I fire at the mark chalked upon the fence, it occurs to my mind that a shot may pierce the fence, and may chance to hit a passenger. But, without examining carefully the ground of my conclusion, I conclude that the fence is sufficiently thick to prevent a shot from passing to the road. Or, without giving myself the trouble to look into the road, I assume that a passenger is not there, because the road is seldom passed. In either case, my confidence is *rash;* and, through my *rashness* or *temerity,* I am the author of the mischief. My assumption is founded upon evidence which the event shews to be worthless, and of which I should discover the worthlessness if I scrutinized it as I ought.

By the Roman Lawyers, Rashness, Heedlessness, or Negligence, is, in certain cases, considered equivalent to "Dolus:" that is to say, to Intention. "Dolo comparatur." "Vix est, ut a certo nocendi *proposito* discerni possit." Changing the expression, they suppose that rashness, heedlessness or negligence, can hardly be distinguished, in certain cases, from intention.

Now this (it appears to me) is a mistake. Intention (it seems to me) is a *precise* state of the mind, and cannot coalesce or commingle with a different state of the mind. "To intend," is to believe that a given act will follow a given volition, or that a given consequence will follow a given act. The chance of the sequence may be rated higher or lower; but the party *conceives* the future event, and believes that there *is* a chance of its following his volition or act. Intention, therefore, is a state of consciousness.

But negligence and heedlessness suppose *un*conscious-

ness. In the first case, the party does *not* think of a given act. In the second case, the party does *not* think of a given consequence.

Now a state of mind between consciousness and unconsciousness (—between intention on the one side, and negligence or heedlessness on the other) seems to be impossible. The party thinks, or the party does *not* think, of the act or consequence. If he think of it, he *intends*. If he do not think of it, he is *negligent* or *heedless*. To say that negligence or heedlessness may run into intention, is to say that a thought may be *absent* from the mind, and yet (after a fashion) *present* to the mind.

Nor is it possible to conceive that supposed mongrel or monster, which is *neither* temerity *nor* intention, but partakes of both:—A state of mind lying on the confines of each, without belonging precisely to the territory of either.

The party who is guilty of Rashness *thinks* of a given consequence; but, by reason of a missupposition arising from insufficient advertence, he concludes that the given consequence will *not* follow the act in the given instance. Now if he surmise (though never so hastily and faintly), that his missupposition is unfounded, he *intends* the consequence. For he *thinks* of that consequence; he believes that his missupposition *may* be a missupposition; and he, therefore, believes that the consequence *may* follow his act.

I will again revert to the example which I have already cited repeatedly.

When I fire at the mark chalked upon the fence, it occurs to my mind that the shot may pierce the fence, and may chance to hit a passenger. But I assume that the fence is sufficiently thick to intercept a pistol-shot. Or, without going to the road in order that I may be sure of the fact, I assume that a passenger cannot be there *because* the road is seldom passed.

Now if my missupposition be absolutely confident and sincere, I am guilty of rashness only.

But, instead of assuming confidently that the fence will intercept the ball, or that no passenger is then on the road, I may surmise that the assumption upon which I act is not altogether just. I think that a passenger may chance to be there, though I think the presence of a passenger somewhat improbable. Or, though I judge the fence a stout and thick *paling*, I tacitly admit that a brick wall would intercept a pistol-shot more certainly. Consequently, I *intend* the hurt of the passenger who is actually hit and wounded. I think of the mischief, when I will the act; I believe that my missupposition *may* be a missupposition; and I, therefore, believe there *is* a *chance*, that the mischief to which I advert may follow my volition.

The proposition of the Roman Lawyers, is, therefore, false.

The mistake (I have no doubt) arose from a confusion of ideas which is not unfrequent:—from the confusion of *probandum* and *probans*:—of the *subject* of an inquiry into a matter of fact, with the *evidence*.

The state of a man's mind can only be known by others through his acts: through his own declarations, or through other conduct of his own. Consequently, it must often be difficult to determine, whether a party *intended*, or whether he was merely negligent, heedless, or rash. The acts to which we must resort as evidence of the state of his mind, may be *ambiguous*: Insomuch that they lead us to one conclusion, as naturally as to the other. Judging from his conduct, the man may have *intended*, or he may have been negligent, heedless, or rash. Either hypothesis would fit the appearances which are open to our observation.

But the difficulty which belongs to the *evidence* is transferred to the *subject of the inquiry*. Because we are unable to determine *what* was the state of his mind, we fancy that the state of his mind was itself *indeterminate*: that it

lay between the confines of consciousness and unconsciousness, without belonging exactly to either. We forget that these are antagonist notions, incapable of blending.

When it was said by the Roman Lawyers, "that Negligence, Heedlessness, or Rashness, is equivalent, in certain cases, to *Dolus* or Intention," their meaning (I believe) was this:—

Judging from the conduct of the party, it is impossible to determine whether he *intended*, or whether he was negligent, heedless, or rash. And, such being the case, it shall be *presumed* that he *intended*, and his liability shall be adjusted accordingly, *provided that the question arise in a civil action*. If the question had arisen in the course of a criminal proceeding, then the presumption would have gone in favour of the party, and not against him.

Such (I think) is the meaning which floated before their minds: Although we must infer (if we take their expressions literally) that they believed in the possibility of a state of mind, lying between consciousness and unconsciousness.

If I attempted to explain the matter fully, I should enter upon certain distinctions between civil and criminal liability, and upon the nature of *præsumptiones juris* or legal presumptions.

It is, therefore, clear to me, that Intention is always separated from Negligence, Heedlessness, or Rashness, by a precise line of demarcation. The state of the party's mind is always *determined*, although it may be difficult (judging from his conduct) to ascertain the state of his mind.

Before I quit this subject, I may observe that *hasty* intention is frequently styled *rashness*. For instance, an intentional manslaughter is often styled *rash*, because the act is not premeditated, or has not been preceded by deliberate intention. Before we can distinguish hasty from deliberate intention, we must determine the nature of intention *as it regards future acts*. But it is easy to see that sudden or hasty intention is utterly different from rashness. When

the act is done, the party contemplates the consequence, although he has not *premeditated* the consequence or the act.

To resume:

Negligence, Heedlessness, and Rashness, likened and distinguished.

It is manifest that Negligence, Heedlessness, and Rashness, are closely allied. *Want* of the *advertence* which one's duty would naturally suggest, is the fundamental or radical idea in each of the complex notions. But though they are closely allied, or are modes of the same notion, they are broadly distinguished by differences.

In cases of Negligence, the party performs not an act to which he is obliged. He breaks a positive duty.

In cases of Heedlessness or Rashness, the party does an act from which he is bound to forbear. He breaks a negative duty.

In cases of Negligence, he adverts not to the act, which it is his duty to do.

In cases of Heedlessness, he adverts not to *consequences* of the act which he does.

In cases of Rashness, he adverts to those consequences of the act; but, by reason of some assumption *which he examines insufficiently*, he concludes that those consequences will not follow the act in the instance before him.

And, since the notions are so closely allied, they are (as might be expected) often confounded. Heedlessness is frequently denoted by the term "negligence"; and the same term has even been extended to rashness or temerity. But the three states of mind are nevertheless distinct; and, in respect of differences between their consequences, should be distinguished.

Having tried to analyze intention (where it is coupled with will), and to settle the notions of negligence, heedlessness, and rashness, I will now trouble you with a few remarks upon certain established terms.

Dolus.

Dolus denotes, strictly, *fraud**:—"Calliditas, fal-

* Bentham, Pr. 91.

lacia, machinatio, ad circumveniendum, decipiendum, fallendum alterum, adhibita."

By a transference of its meaning which is not very explicable, it also signifies *intention*, or *intentional wrong*:—"Injuria qualiscunque *scienter* admissa:"—"Injuria quam quis *sciens volensque* commisit.

The use of the term *dolus* for the purpose of signifying *intention*, may, perhaps, be explained thus:

Fraud imports *intention*: For he who contrives or machinates *ad decipiendum alterum*, pursues a given purpose. For want, therefore, of a name which would denote *Intention* generally, the Roman Lawyers expressed it (as well as they could) by the name of a something which necessarily implied it.

It is an instance of those generalizations which are so common in language: of the extension of a term denoting a species, to the genus which includes that species. [*e. g.* Virtue.]

Culpa (when *opposed* to *Dolus*) imports negli- Culpa.
gence, heedlessness, or temerity; or any injury consequent upon any of these: "Omnis protervitas, temeritas, inconsiderantia, desidia, negligentia, imperitia, quibus *citra dolum*, cui nocitum est." But (used in a larger sense), Culpa is equivalent to the English "*Guilt*." It denotes that the party has broken a duty, intentionally, negligently, heedlessly *or* rashly. "*Generatim*, culpa dicitur quævis injuria ita admissa, ut jure imputari possit ejus auctori." In order that a given mischief may be *imputed* to another, "necesse est, ut culpâ ejus id acciderit." That is to say, through his *intention*; or through his negligence, heedlessness or temerity (as I have explained them above).

Culpa, therefore, is sometimes opposed to *Dolus*; and it sometimes comprises Dolus.

Again: the term *Culpa* is sometimes *opposed* to *Negligentia*. In which case, these words have a very peculiar meaning.*

* The English "guilty," is confined to actions *ex delicto*.

Culpa is restricted to *delicts* (stricto sensu). *Negligence* denotes breaches of obligations (s. s.).

The injuries done through *Culpa* (in this sense) "*faciendo* semper admittantur."

The injuries done "*Negligentiâ*" (in this sense) are committed "faciendo aut non faciendo."

Obligations (s. s.) are positive or negative.

Here then *Negligentia* includes Intention; Negligence (properly so called); Heedlessness, and Temerity.

Origin of this application. *Negligentia* opposed to *Diligentia: i. e.* that care which (ex obligatione) the obliged party is often obliged to employ about the interests of another.

Malice. I have already remarked upon the extension of Dolus to Intention generally. In the English law (in certain cases) we have employed the word "Malice" for a similar purpose. As malice (s. s.) implies intention, it has been extended to cases in which there is no malice. As I shall shew, it does not denote the motive. And it is manifest, that the motive to a criminal action may be laudable.† The intention of an action suggested by a blameable motive, lawful.‡

A few words for the purpose of applying what has been said to the Roman law. Unintentionality, and innocence of intention, seem both to be included in the case of *infortunium*, where there is neither *dolus* nor *culpa*. Unadvisedness coupled with heedlessness, and misadvisedness coupled with rashness, correspond to the *culpa sine dolo*. Direct intentionality corresponds to *dolus*. Oblique intentionality seems

Dolus and Culpa.

* Trustees, Bailees, etc.

† Bentham, "Principles," etc., pp. 89, 115, 132, 142.

‡ Blackstone IV. 190 *et seq.*

hardly to have been distinguished from direct; were it to occur, it would probably be deemed also to correspond to *dolus*.*

Meanings of Dolus, etc.

Dolus bonus et malus.—Mühlenbruch, vol. i. pp. 191, 332.

Dolus = Voluntas nocendo. Consequently it neither includes *indirect*, nor *sudden* intention.—Mühl. 190, 330 *et seq.* Feuerbach,† 51–2, 58. Rosshirt, 37–9, 43. Bentham's Princ.

Dolus indeterminatus.—Feuerb. 56. Rossh. 39.

Culpa = Crimen, Delictum, Injuria.—Rosshirt, 42.

Culpa = Guilt: Dolus et Negligentia (in any of its modifications).—Feuerb. 78–9. Rossh. 35, 42. Mühl. 326, 330 *et seq.*

Culpa as opposed to Dolus. Includes indirect and hasty intention, with negligence in all its modifications.—Feuerb. 51–3, 54–5, 80. Rossh. 42–3–4. Mühl. 330 *et seq.*

Culpa dolo determinata.—Feuerb. 47. Rossh. 39.

Negligentia ob obligationis vinculum præstanda.—Mühl. 333. Mackeldey, II. 160.

Injuria, Delictum, Crimen.—Mühl. 325–6, 185. Feuerb. 24. Rossh. 2. Blackst. 208.

Injuria (generaliter) = "*Omne* quod *non* jure fit."—Justinian.

The obvious division is into 1°, Wrongful Intention with its various modifications, 2°, Wrongful inadvertence with, etc.

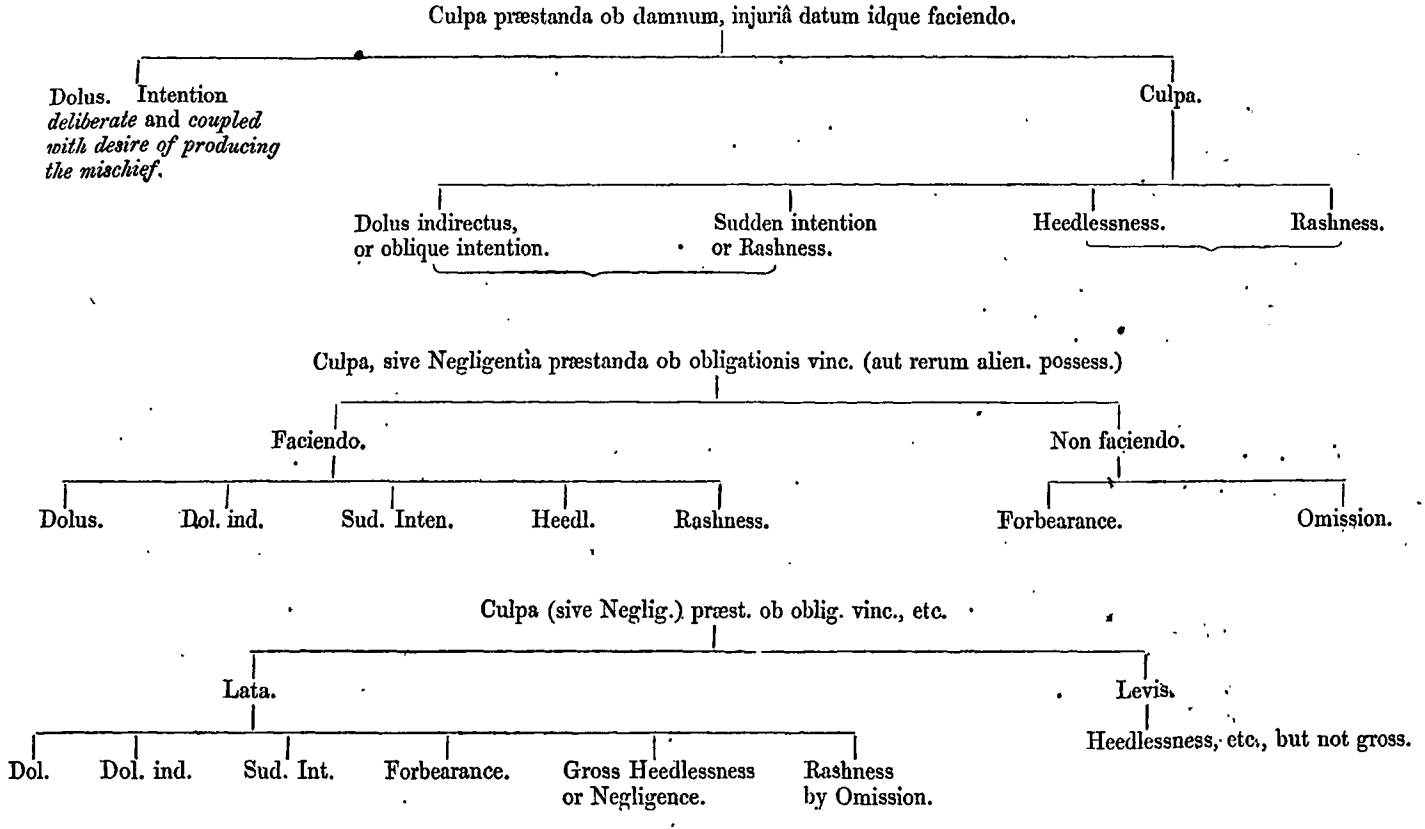
Inconsistencies consequent upon putting indirect and sudden intention into *culpa*, and excluding them from *dolus*.—Feuerb. 80. Rossh. 86.

* It is included in *culpa*. [*Scientia*, but without the *voluntas nocendi*. *Prope dolum*, but not *dolus*.] Nothing can be more accurate.

† *Imputation, Imputability and Guilt.* Conditions of Imputation:

1. Knowledge, actual or possible, on the part of the accused, of the criminality of his act or omission:

2. Dependence on his own wishes, of the forbearance or performance due.—*Marginal Note.*


Culpa præstanda ob damnum, injuriâ datum idque faciendo.
Dolus. Intention deliberate and coupled with desire of producing the mischief.
Culpa.
Dolus indirectus, or oblique intention.
Sudden intention or Rashness.
Heedlessness.
Rashness.
Culpa, sive Negligentia præstanda ob obligationis vinc. (aut rerum alien. possess.)
Faciendo.
Non faciendo.
Dolus.
Dol. ind.
Sud. Inten.
Heedl.
Rashness.
Forbearance.
Omission.
Culpa (sive Neglig.) præst. ob oblig. vinc., etc.
Lata.
Levis.
Dol.
Dol. ind.
Sud. Int.
Forbearance.
Gross Heedlessness or Negligence.
Rashness by Omission.
Heedlessness, etc., but not gross.

LECTURE XXI.

THE intentions which I considered in my last lecture, are coupled with present volitions, and with present acts.

Intentions coupled with volitions and acts.

The party wishes or wills certain of the bodily movements which immediately follow our desires of them: He expects or believes, at the moment of the volition, that the bodily movements which he wills will certainly and immediately follow it: And he also expects or believes, at the moment of the volition, that some given event or events will certainly or probably follow those bodily movements.

In other words, he presently *wills* some given act; intending the act (as the consequence of the volition), and intending some further event (as the consequence of the volition and the act).

But a *present* intention to do a *future* act, is neither coupled with the performance of the act, nor with a present will to do it. The present intention is not coupled with the present performance of the act. For the intention, though present, regards the future. Nor is it coupled with a present *will* to *do* the act intended. For to *will* an act is to *do* the act, provided that the bodily organ, which is the instrument of the volition and the act, be in a sound or healthy state.

Present intention to do a future act, distinguished from an act with a present volition and intention.

Consequently, to do an act with a present intention, is widely different from a present intention to do a future act. In the first case, the act is willed and done. In the

second case, it is neither willed nor done, although it is intended.

Present intention to do a future act, what.

A present intention to do a future act, may (I think) be resolved into the following elements.

First, The party *desires* a given object, either as an end, or as a mean to an end.

Secondly, He *believes* that the object is attainable through acts of his own: Or (speaking more properly) he believes that acts of his own would give him a chance of attaining it.

Thirdly, He *presently* believes that he shall do acts *in future*, for the purpose of attaining the object.

Distinguished from a simple desire of the object.

A *belief* "that the desired object is attainable through acts of our own," and "that we shall do acts thereafter for the purpose of attaining it," are necessary constituents of the complex notion which is styled "a present intention to do a future act."

If these be absent, we simply desire the object.

Unless I believe that the object be attainable through acts of my own, I cannot presently believe that I shall do acts hereafter for the purpose of attaining the object. I cannot believe that I shall try to attain an object, knowing that my efforts to attain it are utterly ineffectual.*

Intention supposes that the object is attainable through conduct of our own. Or (as it is commonly said) that the attainment of the object depends upon our will. And though I believe that the object be attainable through acts of my own, I *simply desire* or *barely wish* the object, unless I *presently* believe that I shall do acts *hereafter* for the purpose of attaining it.

For example, if I wish for a watch hanging in a watchmaker's window, but without believing that I shall try to take it from the owner, I am perfectly clear of *intending*

* *E.g.* Desire to be King. But no man in a private station (unless he be a madman) can intend to aim at the Kingly Office: *i.e.* to pursue a course of conduct leading him to the throne.

to steal the watch, although I am guilty of *coveting* my neighbour's goods (provided that the wish recur frequently).

Present intention to do a future act, restated.

The belief "that the desired object is attainable through acts of our own;" is necessarily implied in the belief "that we shall do acts hereafter for the purpose of attaining it."

Consequently, a present intention to do a future act may be defined to be: "A present *desire* of an object (either as an end or a mean), coupled with a present *belief* that we shall do acts hereafter for the purpose of attaining the object."

It may also be distinguished briefly from a present volition and intention, in the following manner:

In the latter case, we presently will, and presently act, *expecting* a given consequence. In the former case, we neither presently will nor presently act, but we *presently* expect or believe that we *shall* will *hereafter*.

Confusion of Will and Intention.

When we *will* a present act, intending a given consequence, it is frequently said "that we *will* the consequence as well as the act." And when we intend a future act, it is frequently said "that we *will* the act *now*, although we postpone the execution to a future time." In either case, will is confounded with intention.

When we intend a future act, it is also commonly said "that we resolve or determine to do it;" or "that we make up our minds to do it." Frequently, too, a verbal distinction is taken between a strong and a weak intention; that is to say, between a strong or a weak belief that we shall do the act in future. Where the belief is strong, we are more apt to say "that we *intend* the act." Where the belief is weak, we are more apt to say "that we *believe* we shall do it."

Such being the forms of language, it is somewhat difficult to admit, at first hearing, "that a present *intention* to do a future act is nothing but a present *belief* that we shall do an act in future." But that nothing but this really

passes in the mind, any man may convince himself by examining the state of his mind when he intends a future act.

When we speak of *willing* a future act, we are not speaking of our intention to do the future act, but of our wish for the object which we believe may be attained through the act. Or, rather, our wish for the object, and our intention of resorting to the mean, are blended and confounded. And as every volition is a desire, and is also coupled with an intention, the compound of desire and intention is naturally styled a volition, although it is impossible (from the nature of the case) that we *can* will an act of which we defer the execution.

When we say "that we have resolved or determined on an act," or "that we have made up our minds to do an act," we merely mean this: "that we have examined the object of the desire, and have considered the means of attaining it, and that, since we think the object worthy of pursuit, we believe we shall resort to the means which will give us a chance of getting it."

Here, also, the desire of the object is confounded with the *belief* which properly constitutes the intention. Every genuine volition being a desire, and every genuine volition being coupled with an intention, we naturally extend the terms which are proper to *volitions* to every desire which is combined with an intention.

It is clear that such expressions as "determining," "resolving," "making up one's mind," can only apply in strictness to "volitions:" that is to say, to those desires which are instantly followed by their objects, and by which it may be said that we are *concluded*, from the moment at which we conceive thom. He who wills necessarily acts as he wills, and cannot will (with effect) that he will retract or recall the volition. He has "*determined:*" He has "*resolved:*" He has "made up his mind." He is *concluded* by his own volition. He cannot *un*-will that which he has willed.

But when such expressions as "resolving" and "determining" are applied to a present intention to do a future act, they simply denote that we desire the object *intensely*, and that we believe (with corresponding confidence) we shall resort to means of attaining it.

And this perfectly accords with common apprehension, although it may sound (at first hearing) as if it were a paradox. For, every *intention* (or every so-styled *will*) which regards the future, is *ambulatory* or *revocable*. That is to say, the present *desire* of the object may cease hereafter; and the present *belief* that we shall resort to the means of attaining it, will, of course, cease with the wish for it. We cannot *believe* that we shall try to get that, for which we *know* that we care not.

Intending a future forbearance.

It is clear that we may presently intend a future forbearance as well as a future *act*.

We may either desire an object inconsistent with the act to be forborne, *or* we may positively dislike the probable consequences of the act. In the first case, we may presently believe that we shall forbear from the act hereafter, in order that we may attain the object which we wish or desire. In the latter case, we may presently believe that we shall forbear from the act hereafter, in order that we may avoid the consequences from which we are averse.

[*Every* present *forbearance* from a given act, is not preceded or accompanied by a present *volition* to do another act.

It may be preceded or accompanied by mere inaction. *e.g.* I may lie perfectly still, *intending* not to rise.

But, still, it is generally true, that every present forbearance *is* preceded or accompanied by a volition. In our waking hours, our lives are a series (nearly unbroken) of volitions and acts. And, when we forbear, we commonly do a something inconsistent with the act forborne, and which we are conscious is inconsistent with it.]

Where a forbearance is preceded or accompanied by inaction, the desire leading to the forbearance is not to be

compared to a volition. The forbearance is not, like the act, the direct and appropriate object of the wish.

All that can be said (in generals) of intentions to *act* in future, may be applied (with slight modifications) to intentions to *forbear* in future. I confine myself to intentions to *act* in future, in order that my expressions may be less complex, and, by consequence, more intelligible.

An intended consequence of an intended future act, is not always desired.

When we intend a future act, we also intend certain of its consequences. In other words, we believe that certain consequences will follow that future act, which we presently believe we shall hereafter will. This is necessarily implied in every intention of the sort. For our present wish or desire of some probable consequence of the act, is our reason for believing *presently* that we shall do the act *in future*.

But we may also intend or expect that the act may be followed by consequences, which we do not desire, or from which we are averse. For example; I may intend to shoot at and kill you, so soon as I can find an opportunity. But knowing that you are always accompanied by friends or other companions, I believe that I may kill or wound one of these in my intended attempt to kill you.

Here, the object which I wish or desire is your death. I *intend* the act, or I believe that I *shall* will it, because I desire your death. But I also believe that the act will be followed by a consequence from which I am averse:—by a consequence which is not the *ground* of my present intention, although I intend *in spite of it*. I intend a future act. I intend a consequence which I desire. And I also intend a consequence from which I am averse.

Intentions to do future acts, are certain or uncertain;

The execution of every intention to do a future act, is necessarily postponed to a future time.

Every intention to do a future act, is also revocable or ambulatory. That is to say, Before the intention be carried into execution, the desire which is the ground of the intention may cease or be extinguished, or, although it continue, may be outweighed by inconsistent desires.

But though the execution of the intention be always contingent, the intention itself may be certain or uncertain. I may regard the intended act as one which I shall certainly will; or I may regard it as one which I shall will, on the happening of a given contingency. In either case, I may either intend a precise and definite act, or I may merely intend some act for the purpose of attaining my object. Are matured or undigested.

For example; I may intend to kill you by *shooting*, at a given *place* and *time*. Or (though I intend to kill you) I may neither have determined the *mode* by which I shall attain my object, nor the *time* or *place* for executing the murderous design. In cases of the first class, the intention, design, or purpose; is settled, determinate or matured. In cases of the latter class, it is unsettled, indeterminate, or undigested.

It not unfrequently happens, that a long and complex series of acts and means is a necessary condition to the attainment of the desired object (supposing it can be attained). To determine these means, or to deliberate on the choice of them, is commonly styled "a compassing of the desired object." Or, when the intended means are thus complicated, the intention is frequently styled *consilium*. Either of the terms denotes the deliberation or pondering, which necessarily attends the intention before it becomes precise. A *consilium* or compassing.

Such (I think) are the proper meanings of *compassing* and *consilium*. Where the intended means are few and simple, there is no necessity for that long and laborious deliberation, which seems to give to the intention (in the cases in question) the names of "compassing" or consilium.

It must, however, be confessed, that the terms are frequently applied loosely. In the language of the English Law, you would *compass* and imagine the death of the *King*, although you intended to slay him by the shortest and simplest means. For instance, by shooting him with a rifle in

a theatre. And, in various books, I have seen the word "consilium" used for "propositum" or intention.

It is only by the *complexity* of the means, that a compassing or *consilium* is distinguished from another intention. In all other respects, the two states of mind are exactly alike. There is a present desire of a given object, with a belief that we shall resort to means (precise or indeterminate) for the accomplishment of the desire.

Attempts.* It frequently happens that the desired object is not accomplished by the intended act. For example, I point a gun, and pull the trigger, intending to shoot you. But the gun misses fire, or the shot misses its mark. In this case, the act is styled an *attempt:* an attempt to accomplish the desired object. It also frequently happens, that several acts must be done in succession before the desired object can be accomplished. And the doing any of the acts which precede the last, is also an *attempt* to accomplish the desired object, or is rather an endeavour *towards* the accomplishment of the object.

For example; to buy poison for the purpose of killing another, or to provide arms for the purpose of attacking the king, are attempts or endeavours towards murder or treason. Attempts are evidence of the party's intention; and, considered in that light, are styled in the English Law, "*overt acts.*"

Where a criminal intention is evidenced by an attempt, the party is punished in respect of the criminal intention. Sometimes he is punished as severely as if he had accomplished the object. But more commonly, with less severity.

Why the party should be punished in respect of a mere intention, I will try to explain hereafter.

* "Delictum consummatum. Conatus delinquendi." Consummate Crimes and Criminal Attempts.—*Feuerbach*, p. 41.

"Eine Handlung, welche die Hervorbringung eines Verbrechens *zum Zwecke hat*, ohne den bezweckten verbrecherischen Thatbestand wirklich zu machen, ist ein Versuch."—*Rosshirt*, p. 85.

The reason for requiring an attempt, is probably the danger of admitting a mere confession.* When coupled with an overt act, the confession is illustrated and supported by the latter. When not, it may proceed from insanity or may be invented by the witness to it.

I have considered the import of the term "*Intention*," in order that I might elucidate the general nature of Injuries and Political Sanctions.

Intention of Legislator, etc.

But the word Intention is often employed, without reference to wrongs. We speak of the intention of the legislator, in passing a law; of the intention of testators; of the intention of parties to contracts; and so on. In each of these cases, the notion signified by the term "Intention" may be reduced to one of the notions which I have already endeavoured to explain: namely, a present volition and act, with the expectation of a consequence; or a present belief, on the part of the person in question, that he will do an act in future.

When we speak of the intention of the legislator, we either advert to the purpose with which he made the law; or we advert to the sense which he annexed to his own expressions, and in which he wished and expected that others would understand them.

If we advert to the purpose with which he made the law, we mean that he willed and performed a given act, *expecting* a given consequence. In order that he might attain the purpose, he made and published the law. And when he made and promulged it, he *intended* the purpose: that is to say, he *expected* or *believed* that the purpose which moved him to make and promulge it, would follow the making and promulgation *as a consequence*.

If we advert to the sense which he attached to his own expressions, we also mean that he willed and performed an act, *expecting* a consequence. We mean that he used ex-

* Example of man punished for confessed intention (without overt act) to kill Henry III. of France.

pressions with a certain sense, *expecting* that those to whom he addressed them would receive them in the same sense.*

The intention of the testator regards the purpose of the provision, or the sense which he attached to his words. In either case, we mean by "his intention," that he did a certain act, expecting a certain consequence: That he made the provision, expecting the purpose would follow it; or that he used his words with a certain sense, *expecting* that others would understand them in the same sense. When we say, that "the will or intention of the testator is ambulatory," we mean that "he may will and intend anew."

When we speak of the *intention* of contracting parties, we mean the intention of the promisor, or the intention of the promisee. If we mean the intention of the promisor, we mean his intention as it regards the *performance* of his promise, or we mean his intention as it regards the nature or extent of it. In the first case, we mean that he intends (when he makes the promise) to do or forbear in future. In the second case, we mean that he makes a certain promise, *expecting* that the promisee will understand it in a certain sense. In the first case, we mean that he believes he shall do or forbear in future. In the second case, we mean that he does a present act, expecting a given consequence.

If we mean the intention of the promisee, we mean that he accepts the promise, understanding it in a certain sense, and expecting a future consequence: namely, that the promisor will perform it.

He does a present act, expecting a given consequence.

* Or rather, the sense in which it is to be inferred from the words used, or from the transaction, or from both, that the one party gave and the other received it. Paley's rule would lead to this; that a mistaken apprehension of the apprehension in which the promisee received, would exonerate the promisor. This would be to disappoint the promisee. If the apprehension of the promisee did not extend to so much as the promisor apprehends that it did, it is true that the promisor is not surprised by a more onerous obligation than he expected; but then there is no reason for giving the

promisee an advantage which he did not expect: pain of loss being greater than the mere pleasure of gain; which this advantage would be: there being, by the supposition, no expectation and therefore no engagement in consequence.

If on the other hand the promisor underrates the expectation of the promisee he disappoints an expectation.

The true rule is the understanding of both parties. The very use of Paley's rule shews that it embraces both. In the example, Paley seems to confound the sense which the promisor, in common with all, must have put on his promise, with his secret intention of breaking it.

(See "Intention," regarding future.)

The *sense* of the promise, *i.e.* the meaning which each party apprehends that the words or transaction must denote, is a totally different thing from the *intention* with which it is made. The one uses, and he knows he uses, words of such an import; the other hears words which he knows to be of the same import; from these words ensue an obligation, the extent of which each knows, and the compulsory performance of which *in terminis* would not disappoint the expectations of the parties, whatever might be their intentions.

"Where the terms of a promise admit of more senses than one, the promise is to be performed 'in that sense which the promiser apprehended, at the time that the promisee received it.'

"It is not the sense in which the promiser actually intended it, that always governs the interpretation of an equivocal promise; because, at that rate, you might excite expectations which you never meant, nor would be obliged, to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements you never designed to undertake. It must therefore be the sense (for there is no other remaining) in which the promiser believed that the promisee accepted his promise."—*Paley, Moral and Polit. Philosophy*, vol. i. chap. v.

LECTURE XXII.

I HAVE endeavoured to analyze and to fix the meanings of the following related expressions:—"Motive," "Will," "Intention;" "Negligence," Heedlessness," "Rashness."

I now proceed to the essentials of Injury and Sanction, and of that Compulsion or Restraint which is imported by Duty or Obligation.

Duty. Every legal duty (whether it be relative or absolute, or whether it be *officium* or *obligatio*) is a duty to do, or forbear from, an act or acts, and is imposed by a Command (express or tacit) of the person or body which is *sovereign* in a given society.

Injury. As every injury or wrong is a breach or violation of duty, it supposes that an act enjoined is *not* done, or that an act forbidden *is* done.

Sanction. A party lying under a duty, or upon whom a duty is incumbent, is liable to evil or inconvenience (to be inflicted by sovereign authority), in case he violate the duty, or disobey the command which imposes it. The evil to be incurred by the party in case he disobey the command, en*forces* compliance with the command, or secures the fulfilment of the duty. In other words, it inclines the party to obey the command, or to fulfil the duty or obligation which the command imposes upon him. By reason of his liability or obnoxiousness to the eventual or conditional evil, there is a *chance* that he will *not* disobey: A chance which is greater or less (foreign considerations apart), as the evil itself, and

the chance of incurring it by disobedience, are greater or less. The eventual or conditional evil to which the party is obnoxious, is styled a "*Sanction;*" or the Law or other Command is said to be *sanctioned* by the evil.

Obligation is obnoxiousness to a Sanction.

"To be obliged to do or forbear," or "to lie under a *duty* or *obligation* to do or forbear," is to be liable or obnoxious to a sanction, in the event of disobeying a command. In other words, "to lie under an obligation to do or forbear," is to be liable to an evil from the author of the command, in the event of disobedience.

The party is *bound* or *obliged* to do or forbear, because he is obnoxious to the evil, and because he fears the evil. To borrow the current, though not very accurate expressions, he is *compelled* by his fear of the evil to do the act which is enjoined, or is *restrained* by his fear of the evil from doing the act which is forbidden.

Sanction and Obligation distinguished.

The difference between Sanction and Obligation is simply this:

Sanction is evil, incurred or to be incurred, by disobedience to command.

Obligation is liability to that evil, in the event of disobedience.

Obligation regards the future.

Obligation regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms. If the party has acted or forborne agreeably to the command, he has fulfilled the obligation wholly or in part, and the obligation has ended or ceased in respect of that act or forbearance. If he has disobeyed the command by action, forbearance or omission, he has actually incurred the sanction, or is actually liable to the application of the sanction. And, in respect of the forbearance which he has *not* observed, or in respect of the act which he has forborne or omitted, the duty or obligation to which the sanction was annexed, has (as before) ended or ceased. The sanction which has attached upon him may

consist of a new obligation, but that obligation to which the sanction was appended, has (wholly or in part) determined.

Sanctions operate upon the *desires.*

It is not unfrequently said "that Sanctions operate upon the *Will*," and "that men are obliged to do or forbear through their *wills*."

It were more correct to say "that Sanctions operate upon the *desires*," and "that men are obliged to do or forbear through their *desires*."

Stated plainly and precisely, the fact is this:

The party obliged is averse from the conditional evil, which he may chance to incur in case he break the obligation: In other words, he wishes or desires to avoid it. But, in order that he may avoid the evil, or may avoid the chance of incurring it, he must fulfil the obligation: He must do *that* which the Law enjoins, or must forbear from *that* which the Law prohibits.

That every sanction operates upon the *desires* of the obliged, is true. For he is necessarily averse from the evil with which he is threatened by the Law, *as* he is necessarily averse from every evil whatsoever.

That every sanction operates upon the *will* of the obliged, is not true. If the duty be *positive*, and if he fulfil the duty out of regard to the sanction, it may be said with propriety that the sanction operates upon his *will*. For his desire of avoiding the evil which impends from the Law, makes him *do*, and, therefore, *will*, the act which is the object of the command and the duty. But if the duty be *negative*, and if he fulfil the duty out of regard to the sanction, it can scarcely be said with propriety that the sanction operates upon his *will*. His desire of avoiding the evil which impends from the Law, makes him forbear from the act which the Law prohibits. But, though he *intends* the forbearance, he does not *will* the forbearance. He either wills an act which is inconsistent with the act forborne, or he remains in a state of inaction which equally excludes it.

In the former case, he does *not* will the *forbearance*. In the latter case, he wills *nothing*.

If, then, the party fulfil his duty, and if he fulfil his duty out of regard to the sanction, the fact, precisely stated, is this: He is obnoxious to evil from the Law, in case he violate his duty. This conditional evil, like every possible evil, he necessarily wishes to avoid. And, in order that he may avoid the evil with which he is threatened by the Law, he wills the act, or *intends* the forbearance, which the Author of the Law commands.

Again: Every sanction operates upon the *desires* of the obliged, *although he violate the duty*.

If he *do* an act which the Law forbids, or if he *forbear from* an act which the Law enjoins, he desires to avoid the evil with which he is threatened by the Law, although that desire be mastered and suppressed by a conflicting and stronger desire. And, if he *omit* an act which the Law enjoins, he *habitually* desires to avoid the conditional evil, although, at the moment of the omission, he forgets the sanction and the duty.

But, *when the obliged party violates his duty*, it is manifest that the sanction does not operate upon his *will*, although it affects his *desires*. If he do an act which the Law forbids, he wills an act in spite of the sanction. If he violate his duty by forbearance or omission, he does *not* will an act which the Law enjoins, and to make him will which is the scope and purpose of the sanction.

It is, therefore, not true, or is not true universally, that "Sanction operates upon the *will* of the obliged," or "that the party is obliged through his *will*." But it is true, and is true universally, "that Sanction operates upon the *desires* of the obliged," or "that the party is obliged through his *desires*."

For to affirm *that* is merely to affirm *this*:—"That the party is necessarily averse from every evil; and necessarily wishes to avoid the evil by which the command is sanctioned."

[I said, in a former Lecture, that an obligation to *will* is impossible. Why I said so, I am somewhat at a loss to see. For it is quite certain, that the proposition is grossly false, and is not consistent with my own deliberate opinion.

An obligation to *will* not impossible.

We *are* obliged to will, whenever our duties are *positive:* that is to say, whenever we are obliged to act. The Law threatens us with the sanction, in order that we may *act;* and in order that we may act, we must *will.* This, it is manifest, is the meaning of the proposition "that we are bound to act *through our wills.*" The force of the obligation lies in our *desire* of avoiding the threatened evil. But, in order that we may avoid that evil by performing the obligation, we *will* the act which is commanded.

And this is true. For *acts and their consequences* are the objects of positive duties; and every volition is followed by the act which is willed, if the appropriate bodily organ be sound or healthy.

Perhaps, I confounded *desires* (as contradistinguished from volitions) with those peculiar desires which are styled "volitions."

Or, perhaps I intended to affirm that we cannot be obliged to *desire*, in the sense wherein *desire* is opposed to *will.*

And this is also true.]

An obligation to desire not possible.

And here I may remark that we cannot be obliged to desire or not to desire; *i.e.* to desire *that* which the Law enjoins, or *not* to desire that which the Law forbids: For although we *desire* to avoid the sanction, we are not *therefore* averse from that which the law forbids, nor do we therefore incline to that which the law enjoins.

In spite of our aversion from the evil with which we are menaced by the law, we may still desire that which the law forbids, or may desire to evade that which the law exacts: Although our necessary desire of avoiding the sanction, may be stronger than the opposite desire which urges us to a breach of our duty. The desire of avoiding the sanc-

tion may *control* the opposite desire, but cannot supplant or destroy it. Or if it can destroy it, it can only destroy it in the oblique or indirect manner to which I shall advert immediately.

It is equally manifest, that we are not *obliged* to our desire of avoiding the sanction. We are not *bound* or obliged to entertain the desire; but we are bound or obliged, *because* we are threatened with the evil, and *because* we inevitably desire to *avoid* the evil. We are not obliged to entertain the desire, but we are obliged *because* we entertain it.*

Supposed conflict of desire and will.

When we desire that which the Law forbids, or when we are averse from that which the Law enjoins, we observe our duty (supposing we do observe it) *because* our aversion from the sanction tops the conflicting wish.

In these, and in similar cases, it is not unusual to suppose a *conflict* between desire and will. Because we *will* a something from which we are *averse,* it is imagined that we will *against* our desires. The truth, however, is, that there is no conflict *between desire and will,* although there *is* a conflict between inconsistent desires.

I wish to forbear from that which the law enjoins, or I wish to do that which the law prohibits. But I also wish to avoid the evil with which I am threatened by the Law. And as my wish of avoiding this evil is stronger than the opposite wish, I will that which the Law enjoins, or I forbear from that which the Law forbids. I do not will or forbear *against my desires,* but I will or forbear in compliance with a stronger desire, instead of forbearing or willing in compliance with a weaker desire.

It is truly astonishing that this obvious solution of the difficulty escaped the penetration of Mr. Locke. It is of no small importance that the difficulty should be clearly conceived, and the solution distinctly apprehended. For I be-

* [May be bound to will: *i. e.* to act (see *ante*). And to desire, (as a mean, though not for itself,) the object of the duty.]

lieve that the mysterious jargon about the nature of the will has arisen entirely from this purely verbal puzzle.

If we suppose that the Will can control the Desires, or that man can will *against* his desires, we must suppose that will and desire are utterly distinct and disparate.

We cannot admit that volitions are a class of desires, and are merely distinguished from other desires by a certain specific difference: Namely, that they are followed immediately or without the intervention of means, by their direct or appropriate objects.

Effect of obligation in extinguishing desires which urge to a breach of duty.

I have said that we cannot be obliged *not* to desire; that the desire of avoiding the sanction may *master* or *control*, but cannot extinguish a desire which urges to a breach of duty.

But this, though true in the main, must be taken with an important qualification.

The desire of avoiding the sanction cannot destroy *directly*, the conflicting and sinister desire. But the desire of avoiding the sanction may destroy the antagonist desire, *gradually* or *in the way of association*. The thought of the act or forbearance which would amount to a breach of duty, is habitually coupled with the thought of the evil which the Law annexes to the wrong. If our desire of avoiding the evil, which the Law annexes to the wrong, be stronger than our desire of the consequences which might follow the act or forbearance, we regard the latter as a cause of probable evil, and we gradually transfer to the cause our aversion from the effect. Our stronger desire of avoiding the Sanction, gradually extinguishes the weaker desire. Our wish for the agreeable consequences which might follow the wrong, is absorbed by our wish of avoiding the evil which the wrong would probably induce. We regard the wrong as a cause of evil, and we dislike it accordingly.

This is merely a case of a familiar and indisputable fact. Objects originally agreeable become disagreeable, on account of their disagreeable consequences. And objects ori-

ginally pleasing become displeasing by reason of painful consequences with which they are pregnant.

This gradual effect of sanctions in extinguishing sinister desires, is matter of familiar remark, and is expressed in various ways. Owing to the prevalent misconceptions regarding the nature of the will, the effect which is really wrought upon the state of the desires is frequently ascribed to the *will*. It is forgotten that the will is merely an *instrument* of the desires; and that every change in disposition and conduct is a change in the dominant desires, and not in the subject will.

We are told, for instance, by Hobbes, in his 'Essay on Liberty and Necessity,' "that the habitual fear of punishment maketh men just:" "that it frames and moulds their *wills* to justice." The plain and simple truth is this: that it tends to quench wishes which urge to breach of duty, or are adverse to *that* which is *jussum* or ordained.

Where the fear of the evils which impend from the Law has extinguished the desires which urge to breach of duty, the man is *just*. He is not compelled or restrained by fear of the sanction, but he fulfils his duty spontaneously. He is moved to right, and is held from wrong, by that habitual aversion from wrong or injury, which the habitual fear of the sanction has gradually begotten.

The man who fulfils his duty *because* he fears the sanction, is an *un*just man, although his conduct be just. If he could violate his duty without incurring the evil, his conduct would accord with the desires which urge him to break it.

In short, the fear of the evils by which our duties are sanctioned, cannot extinguish *instantly* or *directly* the desires and aversions which urge us to violate our duties. But the fear of those evils may extinguish these desires and aversions, *gradually* or *in the way of association*. Our necessary aversion from the evils with which we are threatened by the Law is often transferred by insensible degrees to the

injuries or wrongs which might bring those evils upon us. Our fear of the sanction is changed into hate of the offence. Instead of fulfilling our duty through fear of the sanction, we fulfil our duty through that aversion from wrong, which the habitual fear of the sanction has slowly engendered. We come to love justice with disinterested love, and to hate injustice with disinterested hate. So far as we fulfil our duties through these disinterested affections, we are just. "Justitia est perpetua voluntas suum cuique tribuendi." So far as we are moved to fulfil them by the evils with which they are sanctioned, we are *un*just *men*, although our *conduct* be just. For if we were freed from the fear which compels or restrains us, our conduct would accord with the sinister desires and aversions, which solicit or urge us to violate our duties.

When I affirm that our fear of the evils by which our duties are sanctioned is frequently transmuted into a disinterested hate of injustice, I am far from intimating that *that* fear is the *only* source of *this* beneficent disposition. The love of justice or the hate of injustice, is partly generated (no doubt) by a perception of the *utility* of justice; and by that love of general utility which is felt by all or most men more or less strongly. But it is also generated, in part, by the habitual fear of sanctions. And to this consideration my attention is particularly directed. For my purpose is not to analyze the sources of the beneficent disposition, but to distinguish the *remote* effect of obligations and sanctions from the *immediate* or *direct*:—to shew that sanctions may inspire us with a disinterested love of justice, although they *compel* us to right, or *restrain* us from wrong, in case that useful sentiment be absent or defective.

When the desires of the man habitually accord with his duty, we say that the man is disposed to justice, or we style the state of his mind a disposition to justice. And this disposition to justice is a ground for mitigation in measuring out punishment or in measuring out censure.

Every legal crime should be visited with legal punishment, and every offence against morals should be visited with reprobation. But when the circumstances of the offence indicate a disposition to justice, or indicate any disposition which is generally useful or beneficent, utility requires that the punishment should *diminish*, or that the censure should *soften* accordingly. The general consequences which would ensue if the offender passed with impunity, render it expedient that it should be visited with punishment or censure. But since there would be few offences if good dispositions were general, it is also expedient to mitigate the punishment or censure, with a view to the good disposition manifested by the criminal.

And this, accordingly, is the usual habit of the world. The occasional aberrations of a man who is habitually just or humane, are treated with less severity than the offences of the dishonest and the cruel. The amount of punishment is frequently determined by this consideration; or (although the nature of the offence exclude mitigation of punishment) public reprobation falls with comparative lenity. The necessity of inflicting the punishment is generally perceived and admitted, but the offender is regarded with a feeling which approaches to compassion and regret, rather than to antipathy and exultation.

Where the desires of the man are habitually adverse to his duty, we say that the man is disposed to injustice, or style the state of his mind a disposition to injustice.

Owing to the prevalent misconceptions about the nature of will, we frequently style the predominance of pernicious desires, a depraved or wicked will. Sometimes, indeed, we mean by a depraved or wicked will, a deliberate intention to do a criminal act. Although it is perfectly manifest, that badness or goodness cannot be affirmed of the will, and that a criminal intention may accord with a good disposition.

NOTES.

(See Leibnitz. Schelling and Kant in Rixner and Krug. Coleridge.)

What they meant by freedom of the Will was not that we desire without a determining cause, or that we will against our desires, but that, in the cases in question, our desires or wills go with our duties, *i. e.* we desire to perform our duty more than anything else.

The term 'Sanction' denotes the conditional evil, which is annexed by the Sovereign to the Command. The term 'Obligation' imports the same object considered from a certain aspect. It denotes present liability to that contingent evil, in case the duty be broken, or the command be disobeyed.

The Latin *Obligatio* denotes the operation of the sanction upon the will of the obliged.

It is manifest that the Latin *obligatio* is equivalent to *ligamen* or *vinculum.* The position of a party obnoxious to a contingent evil, is likened to that of a party who is tied to a given place.

The English *duty* (looking at its derivation) rather denotes *that* to which a man is obliged, than the obligation itself. It is derived, through the French *devoir* (past part.) and the Italian *dovere,* from the Latin *debere.* It is, therefore, equivalent to *id quod debitum est,* rather than to *obligatio.*

Same remark as to the German '*Forderung*' (equivalent to the *obligatio* of the Roman Jurists), 'Pflicht,' 'Verbindlichkeit.'

By "duty" may be meant any duty; but it commonly meant religious duty, or test of duties.

LECTURE XXIII.

I NOW proceed to distinguish physical compulsion or restraint from the restraint which is imposed by duty or obligation.

A sanction is a conditional evil:—an evil which the party obliged may chance to incur, in case he violate the obligation, or disobey the command which imposes it. The party obliged *is* obliged, because he is obnoxious to this evil in the event of disobedience, and because he is necessarily averse from it, or *desires* to avoid it.

The *object* of every duty is an act or forbearance: Or (changing the expression) every duty is a duty to act or forbear. But every act is the consequence of a volition, and every volition is the consequence of a desire: meaning by a *desire*, a desire which is *not* a volition, or a desire strictly so called. Consequently, every act is the consequence of a desire.

And, further, every *forbearance* is *intended;* and is either the effect of an aversion from the consequences of the act forborne, or is the effect of a preference for some object which is inconsistent with the performance of that act. Consequently, every forbearance, like every act, is the consequence of a desire.

Unless we are determined to obedience by disinterested hate of wrong, we fulfil an obligation because we are averse from the sanction. Our desire of avoiding the evil which we might chance to incur by disobedience, makes us will the act which the command enjoins, makes us forbear from

the act which the command forbids. In other words, our desire of avoiding the evil, which we might chance to incur by disobedience, makes us desire the act, or makes us desire the forbearance.

Consequently, we cannot be obliged to *that* which depends not upon our desires, or which we cannot fulfil by desiring or wishing to fulfil it. A stupid and cruel Legislator may affect to command *that*, which the party cannot perform, although he desire to perform it. But though he inspire the party with a wish of fulfilling the command, he cannot attain his end by inspiring those wishes. Nor will the infliction of the pain operate in the way of *example*, or tend to confirm others in their desires of fulfilling their duties. Consequently, the compulsion or restraint which is implied in Duty or Obligation, is hate and fear of an evil which we may avoid by *desiring*: by desiring to fulfil a something, which we *can* fulfil if we wish.

Physical compulsion or restraint distinguished from that which is imported by duty or obligation.

Other compulsion or restraint may be styled merely *physical*. For the term "physical" or "natural" (as it is commonly used) is simply a negative expression: denoting that the object to which it is applied, is *not* some other object which is expressly or tacitly referred to. As applied to compulsion or restraint, it denotes that the compulsion or restraint to which it is applied, is *not* the compulsion or restraint which is imported by Obligation or Duty.

Physical compulsion or restraint, as thus understood, may affect the body, or may affect the mind.

For example: If I am imprisoned in a cell of which the door is locked, physical restraint is applied to my body. I cannot move from my cell, although I desire to move from it. Whether I shall quit, or whether I shall stay in my cell, depends not upon my desires.

Again: I am imprisoned in a cell from which I am able to escape, but, knowing that I may be punished, in case I attempt to escape, the fear of the probable punishment determines or inclines me to stay there.

Now, in this instance, the restraint which is applied to me is not *physical* restraint, but I am *obliged* to stay in my cell. My desire to escape, is not controlled or prevented by outward obstacles. It is controlled or prevented by my opposite or conflicting desire of avoiding the probable punishment. Whether I shall quit, or whether I shall stay in my prison, depends upon my desires.

Further: If the judge sentence me to imprisonment, he may command that I shall be dragged to prison in case I refuse to go, or he may command me to go to prison under peril of an additional punishment. If I refuse to go to prison, and am dragged thither by the officers without a movement of my own, physical *compulsion* is applied to my body. My body moves to the prison in obedience to an outward impulse, and not in compliance with volitions of my own, prompted by a desire of my own. Whether I shall move to prison, or shall not move to prison, depends not upon my desires.

But if I go to prison, knowing that I shall be whipped in case I refuse to go, *physical compulsion* is not applied to my body, but I move to prison *willingly* in consequence of my *obligation* to go. Much as I hate imprisonment, I hate imprisonment coupled with whipping more. My aversion from the heavier punishment, being stronger than my aversion from the lighter punishment; it may be said, that I desire to go to my prison, *i. e.* I desire it as a mean: a mean of avoiding the greater evil, and that that desire makes me will the movements which carry my body to my prison.

As I observed in a former Lecture, the dominion of the will extends not to the mind. That is to say, no change in the state of the mind is accomplished by a mere desire. But, though no change in the mind immediately follows a desire for it, changes in the mind may be wrought through *means* to which we resort in consequence of such desires.

For example, I cannot know a science by simply wishing to know it. But by resorting to means suggested by the wish, I may come to know it. By reading, writing, and meditation, I shall acquire the knowledge which I desire. And so, virtues may be acquired by indirect consequence. Numerous changes in the mind are, therefore, wrought by desires: though none of the desires which work changes in the mind, can be likened to the peculiar desires which are styled volitions.

But a change in the mind may be wrought or prevented, whether we desire the change or whether we do not desire it. And, in all such cases, it may be said that the mind is affected by physical compulsion or restraint.

The conviction produced by evidence, is a case of physical compulsion. If I perceive that premisses are true, and that the inference is justly drawn, I admit the conclusion, though I do not *wish* to admit it, or though the truth be unwelcome, and I would reject the truth if I could. Accordingly, if I love darkness, and hate the light, I naturally eschew the evidence which might expel the grateful error. I refuse to examine the proofs which might render the truth resistless, and I dwell with complacency upon every shadow of proof which tends to confirm my prepossession.*

Obligations to suffer and not to suffer.† I observe, that certain writers talk of obligations to suffer, and of obligations not to suffer. And, as an instance of an obligation to suffer, they cite the supposed obligation to suffer punishment, which is incumbent upon a criminal.

But it is clear that we cannot be *obliged* to suffer, or not to suffer. For whether we shall suffer, or shall not suffer, does not depend upon our desires. By acts or forbearances which *do* depend upon our desires, we may induce

* For this reason, non-belief may be blamable. Where (*e.g.*) it is the result of insufficient examination, refusal to examine, partiality or antipathy indirectly removable, etc.

† Traités, etc., Vol. i. pp. 239, 245.

suffering upon ourselves, or we may avert suffering from ourselves; but the sufferance or passion itself is not immediately dependent upon our wishes to suffer or not.

The Criminal who is condemned to punishment is never *obliged to suffer*, although he may be obliged to acts which facilitate the infliction of the suffering, or may be obliged to forbear from acts which would prevent or hinder the infliction.

For example; If I am condemned to imprisonment, I am not obliged to suffer the imprisonment, although I may be obliged to walk to prison, or to forbear from breaking prison. Whether I shall walk to prison, or shall *not* walk to prison, or whether I shall forbear or not from attempting to break my prison, depends upon my desires. And I can, therefore, be bound or obliged, by fear of additional punishment, to do the act, or to observe the forbearance. But whether I shall suffer the imprisonment, or shall not suffer the imprisonment, does not depend upon my desires in the last result. If, in spite of the additional punishment with which I am threatened, I refuse to go to prison, or attempt to break prison, I may not only be visited with the additional punishment, but physical compulsion or restraint may be applied to my body. I may be dragged to prison by the officers of justice; or, when I am there, I may be secured by walls and chains which defy my attempts to escape.

Passion or suffering, what. Is the *ultimate* sanction of every obligation.

To talk of *obligation* to suffer, is to confound obligation with the ultimate basis of obligation: In the last result, every obligation is sanctioned by suffering: that is to say, by some pain which may be inflicted upon the wrong-doer whether he consent or not: *i. e.* by some pain which may be inflicted upon the wrong-doer independently of an act or forbearance of his own. If this were not the case, and if every obligation were sanctioned by a further obligation, no obligation could be effectual. One obligation might be broken after another;

and as no obligation could be enforced without the consent of the wrong-doer; he would not be obliged at all.

For example; I am condemned to restore a house which I detain from the owner; to make satisfaction for a breach of contract; to pay damages for an assault, to the injured party; or to pay a fine for the same offence.

The sanction which attaches upon me, in this the first stage, is an obligation: An obligation to deliver the house, or to pay the damages or fine.

If I refuse to perform this obligation, I may incur a further obligation: for instance, an obligation to pay a fine or to suffer imprisonment.

But if this were again sanctioned by a further obligation, and that by another, and so on, it is manifest that I should be exempt (in effect) from all obligation.

Either in the first instance, or at some subsequent point, I must be visited with a sanction which can be inflicted without my consent. Suffering, therefore, is the ultimate sanction. Or (changing the expression) every obligation is ultimately sanctioned by suffering, although (in innumerable cases to which I shall advert hereafter) the immediate sanction of the obligation is another obligation.

But though suffering is the ultimate sanction, we cannot be obliged to suffer. For that supposes that we can be obliged to a something which depends not upon our desires. The only possible objects of duties or obligations are *acts* and *forbearances*.

Suffering may be inflicted without physical compulsion or restraint.

Before I conclude I beg leave to observe, that suffering must not be confounded with physical compulsion and restraint. To suffer, is to incur an evil independently of our own consent: a pain which is inflicted upon us, independently of an act or forbearance of our own.

Now, though physical compulsion or restraint, is commonly the mean or instrument by which suffering is inflicted, suffering may be inflicted without it. For instance,

certain obligations are sanctioned by nullities; others again are sanctioned by penalties which are purely infamizing: by a declaration, pronounced by competent authority, that the party shall be held infamous or merits infamy.

In these and in other cases, the sanction is applied without the consent of the party, and without physical compulsion or restraint (or, at least, without such compulsion or restraint applied to the body).

In other cases, the suffering is inflicted by physical compulsion or restraint: Or at least physical compulsion or restraint may be necessary (*e. g.* Punishments which affect the body).

In most of the cases, in which it may be necessary to inflict suffering by physical compulsion or restraint, the physical compulsion or restraint is, in fact, needless: because the party, knowing it may be applied, submits voluntarily.

LECTURE XXIV.

I NOW proceed to consider the import of "*guilt*" or "*imputability:*" which it is necessary to determine, in order that we may fully apprehend the nature of injury or wrong.

Immediate and remote objects of duties.

Every act and every forbearance derives its importance or interest from its positive or negative consequences: that is to say, from certain events by which it is followed; or from its preventing events which would or might have happened, if the act done had *not* been done, or if the act forborne *had* been done.

Consequently, Although acts and forbearances are the *immediate* objects of duties, the positive and negative consequences of the acts and forbearances enjoined, are the objects which they regard *remotely*.

That an act or acts may be done, is the *immediate* purpose of a positive duty. But the production of events by which the act may be followed, or the prevention of events which may happen if the act be *not* done, is the more remote purpose for which the duty is imposed.

That an act or acts may be forborne, is the *immediate* purpose of a *negative* duty. But the prevention of events which may happen in case the act be done, or the production of events which the act might prevent, is the more *remote* purpose for which the duty is imposed.

Forbearances, Omissions, or Acts, which are inconsistent with the remote pur-

If the act enjoined be forborne or omitted, or if the act forbidden be done, the positive or negative consequences, which it is the purpose of the duty to produce, are certainly or probably *not*

produced: Whilst the opposite or contrary consequences, which it is the purpose of the duty to avert, certainly or probably follow the forbearance, omission or act. poses of duties.

Certain of such forbearances, omissions and acts, are *injuries* or wrongs. Wrong, Guilt, Imputability = Breach of Duty.

The persons who have forborne, omitted, or acted, are *guilty*. Or the persons who have forborne, omitted, or acted, are in that plight or predicament which is styled "*guilt*."

The forbearances, omissions, or acts, together with such of their consequences as it was the purpose of the duties to avert, are *imputable* to the persons who have forborne, omitted, or acted. Or the plight or predicament of the persons who have forborne, omitted or acted, is styled "*imputability*."*

All these expressions, it appears to me, are equivalent. They all of them denote this, and nothing but this: "that the persons, who have forborne, omitted, or acted, have *thereby* violated or broken duties or obligations."

A *wrong*, or *injury*, is an act, forbearance, or omission, of such a character, that the party is *guilty*:

And, To be *guilty*, is to have acted, forborne, or omitted, in such wise, that the act, forbearance, or omission, is an *injury* or *wrong*.

If the act, forbearance, or omission, be an *injury* or *wrong*, and if the party be therefore *guilty*, the act, forbearance, or omission, together with such of its consequences as it was the purpose of the duty to avert, are *imputable* to the party. And if the act, forbearance, or omission, together with such of its consequences as it was the purpose of the duty to avert, be *imputable* to the party, the party has broken or violated a duty or obligation.

* ("Imputability" is properly applicable to the culpable act, forbearance, or omission. It is, however, applied to the plight or predicament of the party to whom such act, forbearance, or omission, is imputable.)

Intention, negligence, heedlessness, or rashness, is of the essence of injury, guilt, imputability, or breach of duty.

As I shall shew hereafter, intention, negligence, heedlessness or rashness, is *an essentially component part* of injury or wrong; of guilt or imputability; of breach or violation of duty or obligation.

Whether the act, forbearance, or omission, constitute an injury or wrong; or whether the party be placed by it in the predicament of guilt or imputability; or whether it constitute a breach of duty or obligation; *partly* depends upon his *consciousness*, with regard to *it*, or its consequences, at and before the time of the act, forbearance, or omission. Unless the party intended, or was negligent, heedless, or rash, the act, forbearance, or omission, is *not* an injury or wrong; the party is *not* placed by it in the predicament of guilt or imputability; nor is it a breach or violation of duty or obligation.

But is not of itself injury, guilt, etc.

But a necessary ingredient is *not* the compound into which that ingredient must enter before the compound can exist. An essential part is *not* the complex whole of which it is an essential part.

Intention, negligence, heedlessness or rashness, is *of the essence* of injury or wrong; is *of the essence* of breach of duty; is a *necessary condition precedent* to the existence of that plight or predicament which is styled guilt or imputability.

But intention, negligence, heedlessness, or rashness, is not *of itself* injury or wrong; is not *of itself* breach of duty; will not *of itself* place the party in the plight or predicament of guilt or imputability. Intention, negligence, heedlessness, or rashness, will not place the party in the plight of guilt or imputability, unless it be followed or accompanied by an act, forbearance, or omission: by an act, forbearance, or omission which amounts to an injury or wrong, provided it be preceded and accompanied by that state of the mind. Action, forbearance, or omission, is as necessary an ingredient in the notion of injury, guilt, or im-

putability, as the intention, negligence, heedlessness, or rashness, by which the action, forbearance, or omission, is preceded or accompanied. The notion of injury, guilt, or imputability, does not consist of either considered alone, but is compounded of both taken in conjunction.

This may be made manifest by a short analysis.

Brief analysis of negligence and its modes; of Intention regarding the present, and Intention regarding the future.

If I am *negligent*, I advert not to a given act: And, by reason of that inadvertence, I omit the act.

If I am *heedless*, I will and do an act, not adverting to its probable consequences: And, by reason of that inadvertence, I will and do the act.

If I am *rash*, I will and do an act, adverting to its probable consequences; but, by reason of a missupposition which I examine *inadvertently*, I think that those probable consequences will not ensue. And, by reason of my insufficient advertence to the ground of the missupposition, I will and do the act.

Consequently, negligence, heedlessness, or rashness, supposes an omission or act, which is the result of inadvertence. To that inadvertence, *as taken or considered in conjunction with the omission or act*, we give the name of negligence, heedlessness or rashness. But none of those names has the shadow of a meaning, unless the inadvertence, to which it is applied, be considered in conjunction with the omission or act of which the inadvertence is the cause.

If I *intend*, my intention regards the present, or my intention regards the future. If my intention regards the present, I presently do an act, expecting consequences: Or I presently do an act, or am presently inactive, knowing that the act which I do, or the inaction wherein I am, excludes for the present the performance of another act. In the former case, I presently do an act, intending consequences. In the latter case, I presently forbear from an act.

In either case, my intention is necessarily coupled with a

present act or forbearance: And the word "intention" has no meaning, unless the consciousness or belief to which it is applied be considered in conjunction with that act or forbearance.

If my intention regard the future, I *presently* expect or believe that I shall act or forbear *hereafter*.

Whether an intention, neither consummate nor followed by an attempt, could be made the object of a negative obligation? (*post sub fine.*)

And, in this single case, it is (I think) *possible* to imagine, that mere consciousness might be treated as a *wrong:* might be *imputed* to the party: or might place the party in the plight or predicament which is styled *imputability* or *guilt.*

We *might* (I incline to think) be *obliged* to forbear from *intentions,* which regard future acts, or future forbearances from action: Or, at least, to forbear from *such* of those intentions, as are settled, deliberate, or frequently recurring to the mind. The fear of punishment might prevent the frequent recurrence; and might, therefore, prevent the pernicious acts or forbearances, to which intentions (when they recur frequently) certainly or probably lead.

Be this as it may, I am not aware of a *positive* system of Law, wherein an intention, without an act or forbearance, places the party in the predicament which is styled imputability. In every positive system of which I have any knowledge, a mere intention to forbear in future is innocent. And an intention to act in future is not *imputed* to the party, unless it be followed by an act;* unless it be followed by an act which accomplishes his ultimate purpose, or by an act which is an *attempt* or endeavour to accomplish that ultimate purpose. In either case, the party is *guilty,* because the intention is coupled with an *act:* and with an act from which he is *obliged* to forbear or abstain. For, though he is not obliged to forbear from the *intention,*

* See Feuerbach, 'Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts,' pp. 33, 41, 42, 43. Rosshirt, 'Lerhbuch des Criminal Rechts,' p. 73.

he is obliged to forbear from *endeavours* to accomplish that intention, as well as from such acts as might accomplish his intention directly.

Restriction of ["Guilt" or] "Culpa" to Intention, Negligence, Heedlessness, or Rashness, as the *cause* of Action, Forbearance, or Omission.

Without, then, staying to inquire, whether we *might* be obliged to forbear from naked intentions, I assume, for the present, the following conclusion: a conclusion which accords with general or universal practice.

Intention, negligence, heedlessness, or rashness, is not *of itself* wrong; or breach of duty or obligation; nor does it *of itself* place the party in the predicament of guilt or imputability. In order that the party may be placed in that predicament, his intention, negligence, heedlessness or rashness, must be referred to an act, forbearance, or omission, of which it was the *cause*.

Accordingly, the term "Injury" (or "Wrong") and the term "Breach of Duty," is invariably applied to a *compound* of action, forbearance, or omission, and of intention, negligence, heedlessness, or rashness. The term "imputability" is also applied invariably in a similar sense. It denotes that the party has broken a duty, by some act, forbearance, or omission, which was the *effect* of an intention he had conceived, or of his negligence, heedlessness, or rashness.

But, in the language of lawyers, and especially of criminal lawyers, "guilt" or "culpa" is frequently restricted to the state of the party's mind. It *de*notes the intention of the party, or his negligence, heedlessness, or rashness; although it necessarily *con*notes (or signifies indirectly) the act or forbearance which was the *effect* of his intention, or the omission or act which was the *effect* of his negligence, or of his heedlessness or temerity.

In order that I may shew the meaning which is commonly annexed to "guilt," I will read a few passages from two treatises on German Criminal Law.

One of them is the work of Feuerbach; the most celebrated Criminal Lawyer now living: formerly professor of

Roman and German Jurisprudence, and now president of a Court of Appeal in the Kingdom of Bavaria.

The other is by Dr. Rosshirt, professor of Law at Heibelberg.

Feuerbach's book is entitled, "Institutes of the penal Law which obtains generally in Germany."

The title of Dr. Rosshirt's book may be translated as follows: "Institutes of the Criminal Law which obtains generally in Germany: Including a particular exposition of Roman Criminal Law, in so far as the German is derived from it."

"The application (says Feuerbach)* of a penal Law, supposes that the will of the party was determined positively or negatively: that this determination of the will was contrary or adverse to the duty imposed by the Law: and that this determination of the will was the *cause* of the criminal fact." "The reference of the fact *as effect* to the determination of the will *as cause*, constitutes that which is styled *imputation*. And a party who is placed in such a predicament, that a criminal fact may be imputed to a determination of his will, is said to be in a state or condition of *imputability*."

"The reference of the fact *as effect* to the determination of the will *as cause*, settles or fixes the legal character of the latter.

"In consequence of that reference (or by reason of the imputation of the fact) the determination of the will is held or adjudged to be *guilt*: Which *guilt* is the ground of the punishment applied to the party."

He adds, in a note, "that the '*culpa*' of the Roman Lawyers (as taken in its largest signification), and also the '*reatus*' of more recent writers upon jurisprudence, answers to the '*Schuld*' or '*das Verschulden*' of the German Law."

"*Culpa*" (as taken in its largest signification), *reatus*, and "*Schuld*" (or "*das Verschulden*") may (I apprehend) be translated by the English "*Guilt*."

* Pages 78, 79.

The language of Dr. Rosshirt accords with that of Feuerbach.* "In order (says he) to the existence of a *Crime*, the *will of the party* must have been in such a predicament, that the criminal fact may be *imputed*: that is to say, that the criminal fact may be imputed *as effect* to the state of his will *as cause*."

"The term '*Culpa*' as used by the Roman Lawyers, is frequently synonymous with *Crime* or *Delict*, or with *Injury* generally. But, when they employ it in a stricter sense, it is equivalent to the *reatus* of modern philosophical jurisprudence, to the *Verschulden* of the German Law. It denotes the *state of the party's will*, considered as the *cause* of the criminal fact. It denotes the *dolus*, or the *negligentia*, of which the criminal fact is the ascertained consequence or effect."

In translating these passages, I have thrown overboard certain terms borrowed from the Kantian Philosophy. For the modern German Jurists (like the Classical Jurists of old) are prone to shew off their knowledge of Philosophy, though actually occupied with the exposition of municipal and positive Law.

These impertinent terms being duly ejected, the meaning of the passages is clear and simple.

It merely amounts to this. "Culpa" *de*notes the state of the party's mind: although it *con*notes (or embraces by implication) the positive or negative consequence of the state of his mind.

But I think that the term "Guilt," as used by English lawyers, not only denotes the state of the party's mind, but also the act, forbearance, or omission, which was the consequence. It imports generally "that the party has broken a duty." It embraces *all* the ingredients which enter into the composition of the wrong; and is not restricted to *one* of those necessary ingredients. We say that a man is *guilty* of an injury, or is *guilty* of a breach of duty:

* Pages 35–42.

expressions which would not be applicable, unless the term "*guilt*" imported the whole offence, instead of being limited (like the term "*culpa*") to an essentially component part.

And this (I think) is the meaning which convenience prescribes. A *general* expression for culpable *intention*, and for the various modifications of *negligence*, tends to confusion and obscurity rather than to order and clearness. I am not aware of a single instance, in which it can be necessary to talk of them *collectively*. But it is necessary to *distinguish* them in numberless instances.

Injury, etc., is the contradictory of duty.

Before I conclude this subject, I will remark that the term "Injury," and also the term "Guilt," is merely the contradictory of the term "Duty" or "Obligation."

If I am bound or obliged to *do*, I am bound or obliged *not* to prætermit the act *intentionally or negligently*.

If I am bound or obliged to *forbear*, I am bound or obliged *not* to do the act *intending* certain consequences, or *not* to do the act *heedlessly or rashly*.

I am not absolutely obliged to do or forbear, but to do or forbear *with those various modifications*.

If I prætermit an act intentionally or negligently, I break a positive duty.

If I do an act intending certain consequences, or if I do an act heedlessly or rashly, I break a negative duty.

An injury, or breach of duty, is therefore the *contradictory* of *that* which the Law imposing the duty enjoins or forbids:—"Omne id quod *non* jure fit."

Accordingly, that may be an injury to one purpose which is not an injury to another purpose. Or (changing the expression) that may be a breach of one duty, which is not a breach of another duty.

I am bound not to kill with a *deliberate* intention of killing.

I am bound not to kill with a *sudden* intention of killing.

Each of these is a *distinct* duty; and the compound

whole, which constitutes the corresponding injury, consists, in each case, of a distinct set of ingredients.

If I kill with a deliberate intention of killing, I am guilty of Murder.

But if I kill on a sudden provocation, I am guilty of Voluntary Manslaughter. With reference to the Law which forbids murder, I am not guilty, or have not committed a wrong. To adopt the current phrase, there is not the *corpus delicti* which will sustain a charge of Murder. There is not deliberate intention nor gross heedlessness.

Corpus Delicti.

For *corpus delicti* is a collective name for the sum or aggregate of the various ingredients which make a given fact a breach of a given Law.*

Further instances:

Damage *corpore* to things belonging to another: amounts to a breach of Lex Aquilia.†

Damage *non corpore* amounts to a breach not of Lex Aquilia, but of a duty imposed by the Prætorian Edict, and for which an *actio utilis* lay.

Trespass *vi et armis* and Case is a somewhat similar distinction.

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* For *Corpus Delicti*, see Feuerbach, 75, 76. Rosshirt, 79.

Corpus = Universitas. "*Corpus*," (like "*Universitas*,") frequently denotes the *sum* of the parts (or the *aggregate* of the ingredients) of which a complex (or compound) whole consists: *i. e.* the sum or aggregate of the several individual objects of which a collective object consists, *e.g.* "Omne *Corpus* Juris." Though "Corpus Juris Civilis" frequently denotes the Volumes containing Justinian's Collections.

† "Et placuit ita demum ex ista lege actionem esse, si quis corpore suo damnum dederit atqui alio modo damno dato, utiles actiones dantur," etc.—Gaius, p. 293. De lege Aquilia, § 219.

Damage done by the bodily might of the offender was the proper subject of the Aquilian Law; which was however extended, *per utiles actiones* to other damage within its Equity.—*Marginal Note.*

Attempts as distinguished from consummation.*

For want of the *consequence* there is not the *Corpus* of the principal delict. But the *intention* coupled with an act *tending to the consequence* constitutes the *corpus* of the secondary delict styled an "attempt."

Ambiguity of Schuldner, Reus, etc.

I remarked in a former Lecture that "*jus*," "*recht*," or "right," frequently denotes the duty incumbent upon the party obliged, as well as the right residing in the opposite party; and that the "*Obligatio*" of the Roman lawyers denotes the *jus in personam* residing in the party entitled, as well as the *obligation* incumbent upon the party obliged.

The German "*Schuld*" (or "das Verschulden") reminds me of a similar ambiguity. "*Schuld*" signifies properly, "*liability*." To impute to a person "*Schuld*," is to say that he has broken a duty, and is now *liable* to the sanction.

Accordingly, "*Schuldner*" is synonymous with the Roman "*Debitor*;" which applies to any person lying under any *obligation*: that is to say, an *obligation* (s. s.), or in the sense of the Roman Lawyers.

"*Creditor*" is the correlative of "*Debitor*," and applies to any person who has *jus in personam*. The French "*Débiteur*" and "*Créancier*" have precisely the same meanings. The English "*Obligor*" and "*Obligee*" ought to bear the same significations. But, in the technical language of our Law, the term "*obligation*" or "*bond*" has been miserably mutilated. Instead of denoting *obligatio* (as correlating with *jus in personam*,) it is applied exclusively to certain *unilateral* contracts *evidenced by writing under seal*. Or, rather, it is applied to the writing under seal by which the unilateral contract is evidenced. That is to say, it is not the name of an *obligation*, but of an *instrument* evidencing a *contract* from which an obligation arises. And, in consequence of this

* "Delictum consummatum. Conatus delinquendi." Consummate Crimes and Criminal Attempts. Feuerbach, pp. 41, 42, 43.

"Eine Handlung, welche die Hervorbringung eines Verbrechens *zum Zwecke hat*, ohne den bezweckten verbrecherischen Thatbestand wirklich zu machen, ist ein Versuch." Rosshirt, p. 58.

absurd application of the term *Obligation* or *bond,* the well-constructed expressions *Obligor* and *Obligee* are also completely spoiled. If it were used properly, the term "*Obligee*" would apply to any person invested with *jus in personam:* And the term "*Obligor*" (as the correlative of "*Obligee*") would apply to the party lying under the corresponding duty. But, in consequence of the narrow application of "*bond*" or "*obligation,*" the term "*obligee,*" with its correlative "*obligor,*" exclusively applies to persons who are parties to certain contracts: namely, such unilateral contracts *as are evidenced by writing under seal,* and are couched in a peculiar form: That peculiar form being not less absurd than the absurd application of "*bond*" or "*obligation*" to which I have pointed your attention.

In the strict technical import which it bears in the English Law, the meaning of "*debt*" is not less narrow and inconvenient than the meaning of "*bond*" or "*obligation.*"

In the Roman Law, the term "*debitum*" is exactly co-extensive with the related or paronymous expression "*debitor.*" As "*debitor*" signifies generally a person lying under an *obligation,* "*debitum*" denotes (with the same generality) *every* act or forbearance to which a person is *obliged.* It denotes universally the positive or negative something which is *due* by virtue of an obligation: "id quod *ex obligatione præstandum* est."

But in the strict technical import which it bears in the English Law, "*debt*" is restricted to a *definite sum of money,* due or owing from one party to another party. And, accordingly, the action of debt does not in strictness lie, unless the object of the action be the recovery of a *sum certain.*

In later times, indeed, this strictness has been relaxed: Insomuch that *debt upon simple contract* is not substantially different from an action of *assumpsit:* whilst *debt upon bond* differs from an *action of covenant* in form rather than in effect.

As is usual in English legislation (whether it be direct or judicial) a mischievous absurdity of the old Law has been cured by a mischievous remedy. Instead of *extirping* pernicious rules and distinctions, English Legislators are content to palliate the mischief by the introduction of *exceptions:* exceptions, which aggravate the bulk of the *Corpus Juris,* and (what is an evil of still greater magnitude) which reduce the body of the Law to a chaos of incoherent details.

I will venture to affirm, that no other body of Law, obtaining

in a civilized community, has so little of consistency and symmetry as our own. Hence its enormous bulk; and (what is infinitely worse than its mere bulk) the utter impossibility of conceiving it with distinctness and precision. If you would know the English Law, you must know all the details which make up the mess. For it has none of those large *coherent* principles which are a sure *index* to details. And, since details are infinite, it is manifest that no man (let his industry be what it may) can compass the whole system.

Consequently, the knowledge of an English Lawyer, is nothing but a beggarly account of scraps and fragments. His memory may be stored with numerous particulars, but of the Law as a whole, and of the mutual relations of its parts, he has not a conception.

Compare the best of our English treatises with the writings of the Classical Jurists and of the Modern Civilians, and you will instantly admit that there is no exaggeration in what I have ventured to state.

Returning to the subject from which I have digressed, it is remarkable that "*Schuldner*" (in the older German Law) applied to the *Creditor*, as well as to the *Debitor*: Just as *jus* sometimes signifies duty, as well as right; and just as *obligatio* denotes *jus in personam*, as well as the duty to which the right corresponds.

The *Reus* of the Roman Lawyers is in the same predicament. As opposed to "Actor" it signifies the *defendant* in a *civil* proceeding, or the party who is the object of accusation in a *criminal* proceeding. And, taken in this sense, it is not ambiguous.

But *reus* also signifies a party to a *stipulation*: that is to say, a unilateral contract accompanied by peculiar solemnities. And, taken in this sense, it applies to the promisee or obligee, as well as to the promisor or obligor. Both are *rei*. The party who makes the promise, is styled *reus promittendi*: The party to whom it is made, and by whom it is accepted, is styled *reus stipulandi*. *Correi promittendi* are joint promisors: *Correi stipulandi*, joint promisees.

[Remark upon *stipulatio*. Even in modern language, rather refers to right than obligation.]

LECTURE XXV.

I ASSUMED, in my last Lecture, that Intention or Inadvertence is a necessary ingredient in injury or wrong.

Intention or inadvertence is of the essence of injury.

A short analysis will shew the truth of the assumption.

In case the duty be positive, the prætermission of the act which the duty requires, is the result of forbearance, or the result of omission.

If the prætermission of the act be the result of forbearance, the party, at the time of the forbearance, is conscious of his duty, and knows that the duty of which he is presently conscious, requires the performance of the act from which he forbears.

If the prætermission of the act be the result of omission, the party is conscious *generally* of the duty incumbent upon him, but adverts not to his duty, or to the act which his duty requires, at the moment of the omission.

In either case, he is guilty of injury or wrong, unless some special reason exempt him from liability.

In case the duty be negative, the party does an act from which he is bound to forbear, expecting consequences which it is the object of the duty to prevent. Or the party does the act without adverting to those consequences, or assuming *inadvertently* that those consequences will not ensue. And, on any of these suppositions, he is guilty of Injury or Wrong, unless some special reason exempt him from liability.

Now in all these various cases of forbearance, omission,

and action, the party expects consequences inconsistent with the objects of his duty, or, in case he adverted or attended in the manner which his duty requires, he *might* perceive that such consequences would certainly or probably ensue. In other words, he forbears or acts with an *intention* adverse to his duty, or else he omits or acts negligently, heedlessly, or rashly.

Unless he expected consequences inconsistent with the objects of his duty, or *might* expect such consequences if he adverted or attended as he ought, he *would* not and *could* not *know*, that the forbearance, omission or act would conflict with his duty. And, by consequence, the sanction *would* not and *could* not operate as a motive to the fulfilment of the duty. In short, men are held to their duties by the sanctions annexed to those duties. But sanctions operate upon the obliged in a twofold manner: that is to say, They counteract the motives or desires which prompt to a breach of duty, and they tend to excite the attention which the fulfilment of duties requires. Consequently, injury or wrong supposes unlawful *intention*, or one of those modes of unlawful *inadvertence* which are styled negligence, heedlessness, and rashness. For unless the party knew that he was violating his duty, or unless he *might* have known that he was violating his duty, the sanction could not operate, at the moment of the wrong, to the end of impelling him to the act which the Law enjoins, or of deterring him from the act which the Law forbids.

Cases wherein intention or inadvertence is not an ingredient in breach of duty.

The only instance wherein intention or inadvertence is not an ingredient in breach of duty, is furnished by the Law of England.

In cases of Obligation arising directly from contract, it frequently happens that the performance of the obligation is due from the very instant at which the obligation arises. Or (speaking more accurately) the time for performance is not determined by the contract, and performance is due so soon as the obligee shall desire it.

For example:

If a movable be deposited with me in order that I may keep it in safety, I am bound, *from the moment of the deposit,* to restore it to the bailor.

If I buy goods, and no time be fixed for the payment of the price, I am bound, *from the moment of the delivery,* to pay the price to the seller.

Now, in these, and in similar cases, it is impossible that the obligation should be broken, *through intention or inadvertence,* until the obligee desire performance, and until the obligor be informed of the desire. For, strictly speaking, he is bound to perform the given act, so soon as the obligee shall wish the performance, and so soon as he himself shall be duly apprised of the wish. But, according to the rule which obtains in the Courts of Common Law, the creditor may sue the debtor, as for a breach of the obligation, without a previous demand: The debtor being liable in the action for damages and costs, just as he would be liable if performance had been required, and the obligation had then been broken through his own intention or negligence.

Now as every right of action is founded on an injury, here is a case of injury without intention or inadvertence. For, without a previous demand, or without some notice or intimation that the creditor desires performance, the debtor cannot know that he is breaking his obligation, by not performing the act to which he is obliged.

This monstrous rule of the Common Law Courts, is justified by a reason which is not less monstrous. For it is said that a previous demand were superfluous and needless, inasmuch as the action is itself a demand.

The reason forgets, that a right of action is founded on an injury; that unlawful intention or inadvertence is of the essence of injury; and that, in all the cases which I am now considering, there is no room for unlawful intention or inadvertence, until the creditor desire performance, and until the debtor be apprised of the desire.

Where an *injury has been actually committed*, it is not necessary (although it may be expedient) that the action founded on the injury should be preceded by a demand. For, here, the right of action has already accrued, and the use of the previous demand would merely amount to this: that it would give the debtor an opportunity of redressing the wrong, and might therefore save the parties from the evils which accompany a suit.

But in cases of the class which I am now considering, there is no injury (intentional or by negligence), until the creditor demand performance, and until the debtor (intentionally or by negligence) comply not with the demand.

Strictly speaking, the case stands thus. Looking at the essentials of injury, the party obliged is not guilty of injury. But he is considered by the Courts as if he had broken his obligation, and is accordingly liable in an action for damages and costs.

In *certain* cases of the class which I am now considering, it is, indeed, expedient that the creditor should be permitted to sue, although no demand has been made upon the debtor. But why? Because the debtor has actually broken the obligation; or because the debtor *intends* to break the obligation, and the delay occasioned by a formal demand might facilitate the execution of his unlawful design.

For example:

If the debtor withdraw himself from his home, or from his usual places of resort, *in order that he may evade a demand*, he is placed in the position in which he would have been placed if the demand had actually been made. Or, speaking more strictly, a demand *is* made on the part of the creditor; and it may fairly be *presumed* from the conduct of the debtor, that he has *notice* of the demand. He is fairly liable to an action, and to the costs occasioned by the action. For he is conscious that the obligee requires

performance; he withholds performance notwithstanding; and he is therefore guilty of an actual injury.

Again: If there be reason to suppose that he means to withdraw himself from the jurisdiction, or to place his goods beyond the reach of process, it is reasonable that the creditor should be permitted to sue, without a previous demand. For, here, the debtor presently *intends* to commit an injury; and the delay occasioned by a previous demand, might enable him to defeat the action by withdrawing his person or property.

In this case, the action is instituted for the purpose of *prevention;* and it operates like an injunction, or a *ne exeat regno.*

But where there is nothing in the conduct of the debtor, indicating an intention to frustrate the creditor of his right, it is clear that a demand of performance, with subsequent non-performance, ought to precede the action: And that if an action be brought without this important preliminary, the creditor should be liable for the costs of the needless proceeding, and bound to make satisfaction for the gratuitous vexation which he occasions.

[Read the passage from Evans's Statutes, vol. iii. p. 289.]

"There is another Rule in Courts of Equity which may deserve a different consideration, as applied to legal demands, viz. that length of time is no bar in case of a trust. Where a man deposits money in the hands of another, to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner, until an application and refusal, or other denial of the right; for, until, then, there is nothing adverse; and I conceive that upon principle, no action should be allowed in these cases, without a previous demand; consequently, that no limitation should be computed further back than such demand. And I think it probable, that under these circumstances, the limitation would not be allowed to attach, though the other part of the observation would be as probably disallowed. For a

sweeping rule has been by some means introduced into practice, that an action is a demand; whereas *every action in its nature supposes a preceding default;* where money is improperly received, or goods are bought without any specific credit, or even where money is borrowed generally, there is held to be an immediate duty, and it is a perfectly legitimate conclusion that no demand can be necessary, in addition to the duty itself. But wherever there is a loan in the nature of a deposit, or any other confidential duty is contracted, the mere creation of that duty, unaccompanied with the absolute breach of it, by denial, or inconsistent conduct, ought not to be considered as a ground of action."

I perfectly agree with this reasoning as applied to the case of the deposit. It is only on breach of the obligation, that a right of action should accrue to the bailor. And it is only by refusal or neglect to return the subject on demand, that the obligation is broken.

But similar reasoning is also applicable to the case of goods sold without specific credit; of money lent generally; and of money paid and received by mistake.

[Case of goods sold without specific credit.

Case of money lent generally.]

In the case of money paid and received by mistake, it is necessary to distinguish.

If the money was received *bonâ fide*, it surely is expedient that a demand should precede the action. For until the debtor is apprised of the mistake, it is impossible to say that he has broken *intentionally or by negligence* his obligation to return the money.

If the money was received *malâ fide*, the act of receiving the money was in itself an *injury:* an injury *analogous* to unlawful taking. The only difference between the cases lies in the means. In the one case, I take the goods of another without the consent of the owner. In the other case, I take the goods *with* his consent; but by reason of

an error in which he is, and of which I avail myself by suppressing the truth. Here, therefore, the debtor is guilty of an injury from the very outset; and no demand is necessary as a basis for the action.

[Remark generally on the obligations which arise from the possession of *res alienæ* :—subjects belonging to others.]

In every case of the kind, the party entitled has a right to restitution or satisfaction; and the party in possession is bound to restore or satisfy.

But the nature of the obligation depends upon the consciousness of the party: If he possess the subject *malâ fide*, his possession is a wrong. His obligation to restore or satisfy, arises from an *injury;* and, inasmuch as the right which is violated is *jus in rem*, the obligation is *ex delicto* (in the strict signification of the term).

If he possess the subject *bonâ fide*, his possession is not a wrong. His obligation to restore or satisfy is *quasi ex contractu:* That is to say, It arises from a fact which is neither an injury nor a convention. But so soon as he is apprised of the right which resides in the party entitled, the obligation alters its nature. It may either be considered as arising from a breach of the quasi-contract; or from a violation of the *jus in rem* which resides in the party entitled. And, on either supposition, it arises from an injury. The only difference is, that it arises, on the former, from a breach of quasi-contract; whilst it arises, on the latter, from a *delict* (strictly so called).

[Remark on the indistinctness of the boundary, by which obligations *ex delicto* are distinguished from obligations *quasi ex contractu.*

The receipt of money paid by mistake ought not to be considered as begetting an obligation *quasi ex contractu*, if the party receiving be in *malâ fide*. The action should be Case, and not Assumpsit (assuming, that is, that the forms of action should be kept up).

The Roman Law not free from this uncertainty.

The confusion of quasi-contracts with contracts, peculiar to English Lawyers.

The allegation in bills, "that the plaintiff has requested the defendant to perform the object of the suit, but that the defendant has refused or neglected to comply with that request," is (I should suppose) merely formal: *i.e.* it is not incumbent on the plaintiff to prove it. At least, a demand is not necessary, where the defendant has actually committed an injury. But where notice must be given, before the defendant *can* commit an injury, there (I apprehend) a demand on the part of the plaintiff, with subsequent refusal or neglect on the part of the defendant, is a necessary preliminary to the institution of the suit. *E. g.*: If you are seised in fee in trust for me, you are bound to convey the legal estate as I shall direct. But if I filed a bill for the purpose of compelling a conveyance, without previous demand and consequent refusal or neglect, I think that *Equity* (who, let men traduce her as they may, is far more rational than her sister and rival *Law*) would compel me to pay the costs of the wanton and vexatious suit.

The Roman Law, in regard to the matter in question, is perfectly rational and consistent. In all cases, the institution of an action must be preceded by notice to the debtor, provided the debtor can be found. In case the debtor has not broken the obligation, the notice is necessary as a *basis* to the action. In case the debtor has actually broken the obligation, the notice gives him an opportunity of redressing the injury, and of saving himself and the creditor from the evils of a suit.

Whether or not a demand must precede an *action*, is, therefore, a question which can never arise. As a demand must precede an action in every case whatever, the only question which can arise is this: namely, whether a demand of performance must be made by the creditor, in order that

the debtor may be *in morâ*, and may incur the liabilities which are incident to that predicament. This I will endeavour to explain with all possible brevity.

The non-performance of an obligation is styled *mora*.* for, the debtor *delays* performance; or in consequence of the non-performance, the creditor is *delayed*. Not unfrequently, it is styled *frustratio*, or *dilatio*. *Mora.*

But the predicament in which he is placed in consequence of his non-performance, is also styled *mora*. Or the debtor *qui moram fecit*, is said to be *in morâ*. Being *in morâ*, he incurs liabilities from which he were exempt if he were not *in morâ*.

For example: If a moveable has been deposited with the debtor in order that he might keep it safely, he is not liable for accidental damage, unless he be *in morâ*. But if he refuse to return it on demand made by the creditor, he is *in morâ*: and he is thenceforth liable for accidental damage, as well as for damage occasioned by his intention or negligence.

If he owe money payable on demand, and after demand decline or neglect payment, he is *in morâ*. And, being *in morâ*, he is bound to pay interest on the money which he detains, though no interest was previously payable.

Now if no time be fixed for the performance of the obligation, the debtor is not *in morâ*, and does not incur the liabilities incident to that predicament, unless a demand of performance be made by the creditor, and unless the debtor comply not with the demand. The Rule is, "*Interpellandus est debitor loco et tempore opportuno.*" The authors of the rule justly considered, that intention or inadvertence is of the essence of wrong; and that the obligation could not be broken, either through intention or inadvertence, until the creditor required performance.

If a specific *terminus* or time be fixed for the performance, the debtor is *in morâ* unless he perform at that time,

* Mühlenbruch, i. 325, 339. Mackeldey, ii. 156, 165.

although no demand be made by the creditor. "*Dies interpellat pro homine.*" For, here, the debtor breaks the obligation, intentionally or by negligence, whether a demand be made or not by the opposite party. He knows *generally* that he ought to perform at the time; and a demand of performance on the part of the creditor were, therefore, superfluous: "*Dies interpellat pro homine.*"

Whether a demand of performance ought to precede an action, and whether a demand should be made in order that the debtor may be *in morâ*, are distinct questions. But it is manifest that the solution of either question must be sought for in the same source: namely, in the state of the debtor's consciousness. If he know that performance is due, and yet do not perform, it is reasonable to presume that the non-performance is the consequence of intention or negligence. He is actually guilty of injury. Consequently, a demand of performance is not an *essential* preliminary to the institution of an action. And, further, it is not unreasonable that he should be subjected to certain liabilities, which he would not have incurred, if he had been clear of unlawful intention or unlawful inadvertence.

Before I dismiss this subject, I may make this general remark. In most cases of breach of contract, the intention or negligence of the debtor is so manifest, that the question is not agitated or even adverted to. And from hence we might incline to infer, that intention or negligence is not of the essence of the wrong. If we look into the detail, we immediately perceive that breach of contract as necessarily supposes intention or negligence as any other injury whatever.

For instance; whether a demand be an essential preliminary to an action, or whether the debtor be *in morâ* without a demand, entirely depends upon the presence or absence of intention or negligence. If *without* demand he could not *know* that he was breaking his obligation, it is manifestly

necessary that a demand should be made, before the action is instituted by the creditor, or before the debtor is placed in the predicament which is styled *mora*. In all cases in which the contract binds him to *diligentia* (as in cases of bailment), the question of "negligence or not," also frequently arises.

In ordinary cases the question does not arise, because the intention or negligence is manifest and indisputable.

[Breaches of contract and quasi-contract are injuries. Remark on the Arrangement of the Roman Lawyers.

And, in our own law, we talk of actions *ex contractu* instead of actions from breach of contract. Indeed, in the cases to which I have adverted, the action is *ex contractu:* for there is not properly a breach.]

Resume the principle, that intention or inadvertence is of the essence of injury.

Unlawful intention or unlawful inadvertence, is, therefore, of the essence of injury. And unlawful intention or inadvertence is of the essence of injury, inasmuch as the sanction could not have operated upon the party, unless he had been conscious that he was violating his duty, or unless he *would* have been conscious that he was violating his duty, if he had adverted or attended as he ought.

Grounds of exemption from liability.

If we examine the grounds of the various exemptions from liability, we shall find that most (though not all) of them are reducible to the principles which I have now stated. We shall find (generally speaking) that the party is clear of liability, because he is clear of intention or inadvertence; or (what, in effect, comes to the same thing) because it is *presumed* that he is clear of intention or inadvertence.

Casus or Accident.*

Thus; No one is liable for a mischief resulting from *accident* or *chance* (*casus*): That is to say, from some event (*other* than act of his own), which he was

* Mühlenbruch, i. 179, 326, 331. Mackeldey, ii. 157. Blackstone, iv. 26; iii. 165. Heineccius, Recitationes 538, 539.

unable to foresee, or, foreseeing, was unable to prevent. Whether the event happen through the intervention of man, or whether it happen without the intervention of man, is not important. The essence of *casus, chance,* or *accident,* lies in this: that the event was not an act done by the given party, and could not have been foreseen or prevented by that given party. This (I think) is the meaning of *casus* or *accident,* in the Roman and the English Law.

"By the Common Law" (says Lord Mansfield) "a carrier is an insurer. It is laid down, that he is liable for every *accident,* except by the act of God *or the king's enemies.*" Here, the term *accident* includes the *acts of men:* namely, of the king's enemies. And, in the Digest, it is expressly said, "*fortuitis casibus* solet etiam adnumerari *aggressura latronum.*"

It would seem, then, that *casus* or *accident* includes the act of man. But (I think) it is never extended to the act of the party himself. An act of his own is hardly called an *accident,* although the act be not *imputable,* inasmuch as it is not accompanied by unlawful intention or inadvertence, or is excusable for other reasons.

In the language of the English Law, an event which happens without the intervention of man, is styled "the Act of God." The language of the Roman Law is nearly the same. Mischiefs arising from such events are styled *damna fatalia,* or *detrimenta fatalia.* They are ascribed to *vis divina,* or to a certain personage styled *fatum.* Or the *casus* or *accident* takes a specific name, and is called *fatalitas.*

The language of either system is absurd. For the act of man is as much the act of God as any event which arises without the intervention of man. And if we choose to suppose a certain *fate* or *destiny,* we must suppose that she or it determines the acts of men, as well as the events which are not acts of men.

In the language of the Roman Law, events which happen

without the intervention of man, are sometimes distinguished from the others by the term *natural*. Or (what comes to the same thing) they are ascribed to *vis naturalis*.

Returning to the legal effect of *casus* or *chance*, no man is liable, civilly or criminally, for a purely *accidental* mischief. For, as he could not foresee the event from which the mischief arose, or was utterly unable to obviate the event or its consequences, the mischief is not imputable to his intention or negligence.

For example, If I am in possession of a house, or of a moveable belonging to another, and the subject whilst in my possession is destroyed by an accidental fire, I am not liable to the owner in respect of the damage. "Damnum ex casu sentit dominus."

But when I say, "that no man is liable in respect of an accidental mischief," I mean, "that he is not liable *as for an injury or wrong*." For, by virtue of an obligation arising *aliunde*, he may be liable.

To revert to the instance which I have just cited:—I am liable to the owner for the damage done by the fire, in case I contracted with him to that effect. I am also liable in case I am a carrier, and the subject has come into my possession in the course of my calling. If the subject was deposited with me in order that I might keep it safely, I am also liable (according to the Roman Law) if I am *in morâ*: that is to say, if the owner has requested me to return the subject, and I have nevertheless kept possession of it.

But, in these and similar cases, I am not liable as for an injury, but by virtue of an obligation *ex contractu* or *quasi ex contractu*. The mischief done by the fire, is not the consequence of an injury done by me; although I *shall* be answerable, *as for an injury*, in case I perform not my special obligation to make good the loss arising from the accident.

Ignorance or Error.* Another ground of exemption *is, ignorance* or *error* with regard to matter of fact.

Now, here, although the *proximate* ground is ignorance or error, the *ultimate* ground is the absence of unlawful intention or unlawful inadvertence. For unless the ignorance or error was *inevitable* or *invincible* (or, in other words unless it could not have been removed by due attention or advertence), the act, forbearance, or omission, which was the consequence of the ignorance or error, is imputable to negligence, heedlessness or temerity.

I will touch briefly upon a few cases, wherein the party is exempt from civil and criminal liability, by reason of ignorance or error.

"Si quis" (says Ulpian) "hominem liberum ceciderit, *dum putat servum suum*, in eâ causâ est, ne injuriarum teneatur."

Here, the party whose conduct is in question beats a freeman. But he is not liable as for an assault and battery, because he believes at the time of the beating, that the man is his slave. In consequence of ignorance or error, he thinks that he is exercising his indisputable right of using and abusing his own.

Another case, closely resembling the last, is the following. If the party possess *bonâ fide* a thing belonging to another, and if the thing be damaged by his abuse or carelessness, he is not liable to the owner in respect of the damage; although he *would* have been liable, if he had possessed the thing *malâ fide*. "Rem enim *quasi suam* neglexit."

The foregoing examples are taken from the Roman: the following, from the English Law.

If I hire your servant, *knowing* that he is your servant, I am guilty of an offence against your right in the servant, and am liable to an action on the Case. But if I hire your servant, *not* knowing that he is your servant, I am not

* Feuerbach, p. 80–4. Mühlenbruch 193, 331. Rosshirt, 53. Blackstone, iii. 142, 154; iv. 26. Bentham Pr. 168.

guilty of a wrong, and am not liable to an action, until I receive notice of his previous contract with you.

If I keep a dog given to worry cattle, and if I am apprised of *that* his mischievous inclination, I am liable for damage done by the dog to my neighbour's cow or sheep. But unless I am apprised of his vicious disposition, I am not guilty of an injury, and am not liable to make good the damage. For the damage is not imputable to my intention or inadvertence.

If, intending to kill a burglar who has broken into my house, I strike in the dark and kill my own servant, I am not guilty of murder, nor even of manslaughter. For the mischief is not imputable to intention or inadvertence, but to inevitable error. That is to say, to error which could not have been prevented by any attention or advertence, practicable under the circumstances.

And so much for ignorance or error, with regard to matter of fact.

Before I dismiss the subject, I will briefly advert to ignorance or error, with regard to the state of the law.

In order that an obligation may be effectual (or, in other words, in order that the sanction may operate as a motive to fulfilment), two conditions must concur. 1st, It is necessary that the party should know the law, by which the *Obligation* is imposed, and to which the *Sanction* is annexed. 2dly, It is necessary that he should actually know (or, by due attention or advertence, *might* actually know), that the given act, or the given forbearance or omission, would *violate* the law, or amount to a *breach* of the obligation. Unless these conditions concur, it is impossible that the sanction should operate upon his desires. Or (changing the expression) the given act, or the given forbearance or omission, cannot be imputed to an unlawful intention, or to any of those modes of unlawful inadvertence which are styled negligence, heedlessness, or rashness.

Accordingly, inevitable ignorance or error in respect to matter of fact, is considered, in every system, as a ground of exemption.

With regard to ignorance or error in respect to the state of the law, the provisions of different systems appear to differ considerably; although they all concur in assuming *generally*, that it shall not be a ground of exemption. "*Regula* est, juris ignorantiam cuique nocere," is the language of the Pandects. And *per* Manwood, as reported by Plowden, "It is to be presumed that no subject of this realm is misconusant of the Law whereby he is governed. Ignorance of the Law excuseth none."

I have no doubt that this rule is expedient, or, rather, is absolutely necessary. But the reasons assigned for the rule, which I have happened to meet with, are not satisfactory.

The reason given in the Pandects, is the following:

"In omni parte, error *in jure* non eodem loco quo *facti* ignorantia haberi debebit. Nam jus *finitum* et possit esse et debeat. Facti interpretatio plerumque etiam prudentissimos fallat."*

Which reasoning may be expressed thus:

"Ignorance or error with regard to matter of fact, is often inevitable: that is to say, no attention or advertence could prevent it. But ignorance or error with regard to the state of the law, is never inevitable. For the law is definite and knowable, or might or ought to be so. Consequently, ignorance or error with regard to the law is no ground for exemption. If the conduct of the party be imputable to ignorance of law, it is not imputable *directly* to unlawful intention or inadvertence. But as the ignorance to which it is imputable is the consequence of unlawful inadvertence, his conduct, in the last result, is caused by his negligence."

The reasoning involves the small mistake of confounding "is" with "might be" and "ought to be." That Law *might* be knowable by all who are bound to obey it, or that

* Digest, 22, 6, 2.

Law *ought* to be knowable by all who are bound to obey it (—"*finitum* et possit esse et debeat"), is, I incline to think, true. That any actual system *is* so knowable, or that any actual system has ever been so knowable, is so notoriously and ridiculously false that I shall not occupy your time with proof of the contrary.

Blackstone produces the same *pretiosa ratio*, flavoured with a spice of that circular argumentation wherein he delights. "A mistake (says he) in point of Law, which every person of discretion, not only *may*, but is bound and presumed to know, is in criminal cases no sort of defence."

Now to affirm "that every person *may* know the law," is to affirm the thing which is not. And to say "that his ignorance should not excuse him *because* he is *bound* to know," is simply to assign the rule as a reason for itself. Being bound to know the law, he cannot effectually allege his ignorance of the law as a ground of exemption from the law. But *why* is he bound to know the law? or *why* is it presumed, *juris et de jure*, that he knew the law?

The only *sufficient* reason for the rule in question, seems to be this: that if ignorance of law were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable. If ignorance of law were admitted as a ground of exemption, ignorance of law would always be alleged by the party, and the Court, in every case, would be bound to decide the point.

But, in order that the Court might decide the point, it were incumbent upon the Court to examine the following questions of fact: 1st, Was the party ignorant of the law at the time of the alleged wrong: 2ndly, Assuming that he was ignorant of the law at the time of the wrong alleged, was his ignorance of the law *inevitable* ignorance, or had he been previously placed in such a position that he might have known the law, if he had duly tried?

It is manifest that the latter question is not less material than the former. If he might have known the law in case he had duly tried, the reasoning which I have produced from the Pandects would apply to his case. That is to say; Inasmuch as the conduct in question were *directly* imputable to his ignorance, it were not imputable *directly* to unlawful intention or inadvertence. But, inasmuch as his ignorance of the law were imputable to unlawful inadvertence, the conduct in question were imputable, in the last result, to his *negligence*.

Now either of these questions were next to insoluble. Whether the party was *really* ignorant of the law, and was *so* ignorant of the law that he had no *surmise* of its provisions, could scarcely be determined by any evidence accessible to others. And for the purpose of determining the *cause* of his ignorance (its *reality* being ascertained), it were incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution.

The reason for the rule in question, would, therefore, seem to be this:—It not unfrequently happens that the party is ignorant of the law, and that his ignorance of the law is inevitable. But if ignorance of law were a ground of exemption, the administration of justice would be arrested. For, in almost every case, ignorance of law would be alleged. And, for the purpose of determining the *reality* and ascertaining the *cause* of the ignorance, the Court were compelled to enter upon questions of fact, insoluble and interminable.*

That the party shall be presumed *peremptorily* conusant

* Observe. The admission of ignorance of *fact* as a ground of exemption, is not attended with those inconveniences which would seem to be the reason for rejecting ignorance of *law* as a valid excuse. Whether the ignorance really existed, and whether it was imputable or not to the inadvertence of the party, is a question which may be solved by looking at the circumstances of the case. The inquiry is limited to a given incident, and to the circumstances attending that incident, and is, therefore, not interminable.

of the law, or (changing the shape of the expression) that his ignorance shall not exempt him, seems to be a rule so necessary, that law would become ineffectual if it were not applied by the Courts generally. And if due pains were taken to promulge the law, and to clear it of needless complexity, the presumption would accord with the truth in the vast majority of instances. The party (generally speaking) *would* actually *know* the law. Or the party, at least, might so *surmise* its provisions, that he could shape his conduct safely. The reasoning in the Pandects would then be just. The law would be in *fact* as "*finitum*" and knowable, as "*possit esse, et debeat.*"

I have said that the provisions of different systems seem to differ considerably with regard to the principle which I am now considering.

In our own law, "ignorantia juris non excusat" seems to obtain without exception. I am not aware of a single instance, in which ignorance of law (considered *per se*) exempts or discharges the party, civilly or criminally. In the case of infancy, and in certain other cases to which I shall advert directly, the presumed incapacity of the party to know the law would seem to be *one* of the grounds upon which the exemption rests. But his presumed incapacity to know the law is only *one* of those grounds. His exemption rests *generally*, upon his *general* incapacity (real or presumed) to judge sanely of law or fact.

From an opinion thrown out by Lord Eldon, in the case of Stockley and Stockley, I inclined to think (at the first blush) that a party would be relieved, in certain instances, from a contract into which he had entered in ignorance of law.* But admitting the justness of Lord Eldon's conclusion, the agreement (I conceive) would be void, not because the party was ignorant of the law, but because there is no consideration to support the promise.

According to the Roman Law, there are certain classes

* 1 Vesey and B., 31.

of persons, "quibus permissum est jus ignorare." They are exempt from liability (at least for certain purposes), not by reason of their general imbecility, but because it is presumed that their capacity is not adequate to a knowledge of the law. Such are women, soldiers, and persons who have not reached the age of twenty-five. Here, ignorance of law (considered *per se*) is a ground of exemption. For women, soldiers, and multitudes of persons under twenty-five are not in that state of general imbecility, which is the ground of exemption in case of insanity, or in case of extreme youth.* But ignorance of law (as a specific ground of exemption) is only admissible in favour of persons who belong to certain classes.

And this (I apprehend) shews distinctly, that the exclusion of *ignorantia juris*, as a ground of exemption, is deducible from the reason which I have already assigned. In ordinary cases, the admission of *ignorantia juris* as a ground of exemption would lead to interminable inquiry. But, in these excepted cases, it is *presumed* from the *sex*, or from the *age*, or from the *profession* of the party, that the party was ignorant of the law, and that the ignorance was inevitable. The inquiry into the matter of fact is limited to a given point: namely, the sex, age, or profession of the party who insists upon the exemption. That obvious fact being ascertained, the legal presumption or inference is drawn by the tribunal without further investigation.

Whether the legal presumption ought to obtain, or whether in most cases it do not conflict with the truth, is a distinct question. What I advance is this: that, in ordinary cases, the inquiry were impracticable, because the facts upon which the solution depends are not to be ascertained.

In these excepted cases the inquiry is practicable, because it is predetermined by a general rule, that certain facts (which *may* be ascertained) shall be received by the Courts as evidence of the facts in question. Nor would the case be

* Digest, 22, 6, 9.

materially altered, assuming that the presumption may be rebutted. For the counter-evidence must necessarily consist of a specific fact or facts. The large and vague inquiry is shut out by the legal presumption.

[Analogous case of *doli capacitas* in infancy.]

Before I quit this subject, I will advert to a curious distinction made by the Roman Law.

The persons, *quibus permissum est jus ignorare*, cannot allege with effect their ignorance of the law, in case they have violated those parts of it which are founded upon the "jus *gentium*."* For the persons in question are not generally imbecile, and the *jus gentium* is knowable *naturali ratione*. With regard to the *jus civile*, or to those parts of the Roman Law which are peculiar to the system, they may allege with effect their ignorance of the law.

[Observe *vivâ voce*. *Malum prohibitum—Malum in se*.]

This Rule is not absurd, inasmuch as certain laws are so obviously suggested by Utility, that a person of small experience (if not affected with insanity) would naturally *surmise* their existence. And if we look accurately at the fact, we shall find that most men's knowledge of law merely amounts to this.

I may remark (before I conclude), that the objection to laws *ex post facto* is deducible from those general principles with regard to intention and inadvertence which I am endeavouring to explain. At the time of the alleged wrong, the law was not in existence. And, by inevitable consequence, the party did not, and could not know, that he was violating a law. The sanction could not operate as a motive to obedience, inasmuch as there was nothing to obey.

* Nor (per Labeo) can they allege it, if the law might have been conjectured, or if they had access to good legal advice. Dig. *ubi supra*.

I am provoked to make this remark by a silly and flippant attempt in the 'Edinburgh Review' to justify or palliate *ex post facto* legislation. Speaking of Lord Strafford's attainder, the writer talks to the following effect.

"It is commonly objected to punishment inflicted *ex post facto*, that it operates not as a warning. But this is a fallacy. Punishment inflicted *ex post facto* does operate as a warning. The punishment inflicted upon Lord Strafford operated as a warning to succeeding statesmen." The writer mistakes the objection (simple and obvious as it is) which is commonly urged against punishment inflicted *ex post facto*. It is not objected to such punishment, that it may not operate as a warning. But it is objected, and is truly objected, to such punishment, that the party *upon whom it is inflicted* was not warned. He confounds the application of a law to cases which precede it, with the application of the same law to cases which follow it. With regard to cases which precede it, the law (if it extend to those cases) is an *ex post facto* law. With regard to cases which follow it, it is not.

That is to say, the writer answers the objection to *ex post facto* legislation, by shewing that the objection does not apply to *other* legislation.

I have treated this nonsense with great indulgence; for I have assumed that the punishment inflicted upon Lord Strafford might at least operate as a warning to succeeding statesmen.

But even this is false. For the law by which he suffered was not only *ex post facto*, but was what is styled in the Roman Law a *privilegium*. It was a law inflicting punishment upon Strafford specifically, and not declaring in general expressions, "that those who might do thereafter as Strafford had done should be visited with Strafford's fate."

If the punishment had been inflicted by virtue of a judicial decision, then also it might have operated as a warning. For one judicial decision being commonly the basis of

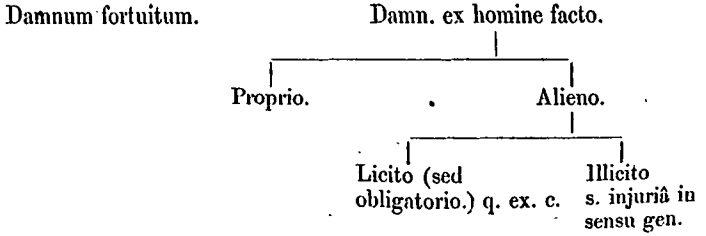
others, a judicial decision is tantamount to a law conceived in general expressions.

But from an arbitrary Command nothing can be concluded. Although the supreme Legislature punished Strafford, it could not be inferred (looking at the nature of its proceeding) that it would punish future Statesmen walking in Strafford's steps.

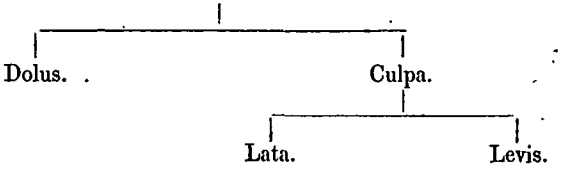
[Remark, that judicial decisions *primæ impressionis* are always *ex post facto*.]

NOTES.

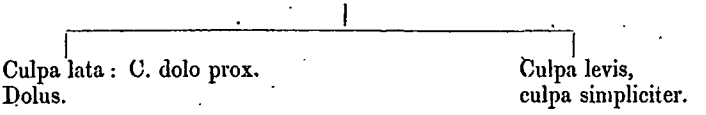
The subjoined Tables are copied from the margins of Mühlenbruch and Mackeldey at the pages referred to in the footnotes, pp. 165, 168.—*S. A.*

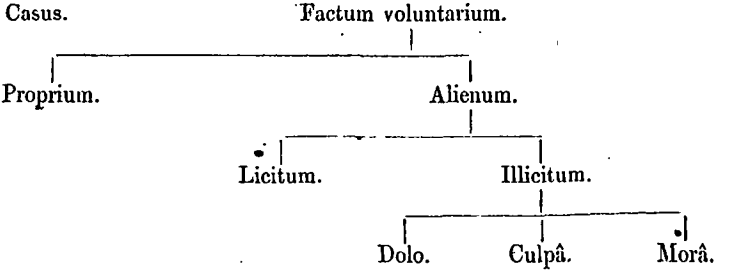


Aquilia culpa (s. Culpa simpliciter) ob damnum *injuriâ* datam, idque faciendo, præstanda.



Negligentia ob Obligationis vinculum, idque faciendo vel non faciendo, præstanda.





LECTURE XXVI.

HAVING in my last Lecture considered the reason of the maxim, "that ignorance of Law shall not excuse," I adverted to certain exceptions from that necessary maxim which are permitted by the Roman Law.

I then endeavoured to shew, that those exceptions from the maxim consist with the reason of the maxim, and also serve to indicate what that reason is.

Lastly, I shewed that those exceptions ultimately rest upon the principle, which it was the main purpose of my Lecture to explain and illustrate:—That, wherever ignorance of law is a ground of exemption, the ignorance of law is presumed to have been *inevitable*, and the party to have been therefore *clear* of unlawful intention and inadvertence.

If I examined *all* the exemptions which ultimately rest upon this principle, the present inquiry would run to unconscionable length. But I will briefly touch upon a few, to which I did not advert in my last Lecture.

Infancy and Insanity.

And, first, an infant or a person insane is exempted from liability, not because he is an infant or because he is insane, but because it is inferred from his infancy or insanity, that the alleged wrong was not the consequence of unlawful intention or inadvertence. It is *inferred* from his infancy or insanity, that, at the time of the alleged wrong, he was ignorant of the law; or (what in effect is the same thing) was unable to remember the law. Or (assuming that he had known, and was unable to re-

member the law) it is inferred that he was unable to apply the law, and to govern his conduct accordingly: that he did not and could not foresee the consequences of his conduct; and, therefore, did not and could not foresee, that his conduct tended to the consequences which it was the end of the law to avert.

For, in order that I may adjust my conduct to the command or prohibition of the law, I must know and remember what the law *is;* I must distinctly apprehend the *nature* of the conduct which I contemplate; and (in the language of lawyers and logicians) I must correctly *subsume* the specific case *as falling within the law.* In other words, I must compare the conduct which I contemplate with the purpose or end of the law, and must be able to perceive that it agrees or conflicts with that purpose or end. Unless I am competent to this intellectual process, the sanction cannot operate as a motive to the fulfilment of the obligation, or (changing the expression) the obligation is necessarily ineffectual. Every application of the law to a fact or case, is a syllogism of which the minor premiss and the conclusion are singular propositions.

That the ultimate basis of these exemptions is that which I have assigned, will appear on a moment's consideration.

For if the infant was *doli capax* (or was conscious that his conduct conflicted with the law), his infancy does not excuse him. The specific and precise evidence afforded by the fact or its circumstances, rebuts the general and uncertain presumption which arises from his age. And if the alleged wrong was done in a lucid interval, the fact is imputed to the madman. There are, indeed, cases, wherein the *presumptio juris* founded on infancy is "*juris et de jure.*" That is to say, the presumption (or rather the inference) which the law præappoints, is conclusive as well as præappointed. The tribunal is not only bound to draw the inference, but to reject *counter*-evidence.

[*Digression, vivâ voce.*—It is absurd to style conclusive inferences, *presumptions*. For a presumption, *ex vi termini*, is an inference or conclusion which *may* be disproved. Till proof to the contrary be got, the inference may hold. *On* proof to the contrary, it can hold no longer.

But according to the language of the Civilians (language which has been adopted by some of our writers on evidence), *presumptions* are divisible in the following manner.

Presumptions are presumptions *juris*, or presumptions *hominis*. Presumptions *juris* are inferences drawn in pursuance of the præappointment of the law. The law predetermines the *probative* effect of the fact, or instructs the judge to draw a certain inference from a fact of a certain sort. For instance, to infer from the fact of infancy, that the infant was incapable of governing his conduct agreeably to the provisions of the law. Presumptions *hominis*, or presumptions simply so called, are drawn from facts, of which the law has left the probative force to the discretion of the judge. In other words, he is not instructed to draw a given inference from a fact of the sort. Presumptions *juris*, are again divisible into presumptions *juris* (simply so called) and presumptions *juris et de jure*.

There are therefore three classes of presumptions: presumptions *hominis*, presumptions *juris*, and presumptions *juris et de jure*.

Where the presumption is a *presumptio hominis*, not only is proof to the contrary admissible, but the presumption is not necessarily conclusive, though no proof to the contrary be adduced. For instance; I sue you for goods sold and delivered, and I produce a fact leading to a presumption that the goods *were* delivered. Not only is it competent to the judge to admit counter-evidence, but to reject the presumption as *insufficient*, though no counter-evidence be adduced. For, here, the judge is at liberty to determine without restriction the exact worth of the fact as an article of evidence.

Actions frequently fail; not because the evidence, produced by the Actor, is met by counter-evidence, nor because the evidence which he produces is altogether worthless; but because the inference or presumption founded upon the facts produced, is too feeble to sustain the case. The inference drawn from testimony to the truth of the fact attested is also in truth of this kind.

Where the presumption is *presumptio juris* simply, proof to the contrary is *admissible*, but, till it be produced, the presumption necessarily holds. For, here, the law has predetermined the probative force of the fact, although it permits the judge to receive counter-evidence. The law, or the maker of the law, says to the Courts, "Receive counter-evidence if it be produced, and weigh the effect of that evidence against the worth of the presumption. But till such counter-evidence be produced, draw from the given fact the inference which I predetermine." For example: Where an infant has attained a certain age, proof of his *doli capacitas* is admissible. But until such proof be produced, it is inferred from the fact of his infancy, that he is not *doli capax*.

Where the *presumptio juris* is *juris et de jure*, the law predetermines the probative force of the fact, and *also* forbids the admission of counter-evidence. The inference (for it is absurd to call it a presumption) is *conclusive*. That is to say, proof to the contrary is not admissible. For, all that is meant by a conclusive proof, is a proof which the law has made so. Independently of predetermination that it *shall* be conclusive, no inference from one fact to another can be more than probable: Although, in loose language, we style the proof *conclusive*, wherever the probability appears to be great.

As an instance of a presumption *juris et de jure*, I may mention the case of an infant under a certain age; for example seven years. Here, according to the Roman law, and (*semble*) according to our own, the infant is presumed

juris et de jure incapable of unlawful intention or culpable inadvertence. His incapacity is inferred or presumed from the age wherein he is; and proof to the contrary of that præappointed inference, is not admissible by the tribunals.

In numerous cases, presumptions *juris et de jure* are purely fictitious. They are resorted to by the Courts as a means of legislating indirectly. For example, a *grant* of an easement is inferred from the fact of its having been enjoyed, or a surrender of a trust term is presumed by the Courts of Law because the trust has been performed. In the first case (which is the simpler and more intelligible of the two) a certain legal consequence is annexed to length of enjoyment by means of a fictitious presumption. It is not believed that there ever was a grant; but the jury are instructed by the judge to infer that there was from the fact of the enjoyment.

In other words, acquisitive prescription is unknown to the English Law in its direct form.* Directly and avowedly, length of enjoyment is not a *mode of acquisition*, or (in the language of our own law) a *title*. But a *grant* is a *title* directly and avowedly: And, by feigning a grant from length of enjoyment, length of enjoyment becomes a title in effect, or that mode of acquisition which is styled *acquisitive* prescription is introduced *indirectly*.

* No acquisitive prescription in English Law.† Difference between acquisitive and restrictive prescription not so obvious now, on account of the frequent use of possessory actions. It is scarcely necessary to add, that unless these fictitious presumptions were *juris et de jure* they would not answer their purpose. But though presumptions *juris et de jure* are often fictitious, they are not always so. Some of them are really founded upon probability; and counter-evidence is excluded for a special reason. As, for instance, the legal presumption, "that those who are subject to the law know the law," is really true in a great majority of instances. And proof to the contrary would seem to be inadmissible, for the reason which I assigned at length in my last Lecture.

† [I am informed that this is no longer true, and have been furnished with a reference to 2 Smith, L. C. 581. See further on this subject, *post*, 188.—*S. A.*]

The number of rights and obligations, which (in our own law and in the Roman also) are created and imposed obliquely by means of these fictitious presumptions, is truly astonishing.]

Reverting to the subject from which I have digressed,—the presumption *juris et de jure* "that the infant under seven is not *doli capax*," is probably well founded in almost every instance. It is probably made conclusive in *all* instances, on account of the little advantage which could arise from the punishment of a child in any instance whatever. His punishment would rather revolt, than serve as a useful example, and it is therefore expedient to extinguish inquiry at once by a conclusive presumption of innocence. It cannot, then, be inferred from this case, that the exemption from liability by reason of infancy does not rest upon the broad principle which I am endeavouring to explain.

I observe that Mr. Bentham ascribes this exemption, and also the exemption in case of insanity and drunkenness, to a different principle: namely, "that the prospect of evils so distant as those which are held forth by the Law, cannot have the effect of influencing the conduct of the party."

But this (I think) will not hold. In case the party, at the moment of the alleged wrong, were conscious of the law, and could foresee the consequences of his conduct, it is manifest that the sanction would inspire him with some desire of avoiding it. And an inquiry into the strength or steadiness of that desire, would seem to be idle; because it must necessarily be different in every different person, whether he be infant or adult, mad or sane, drunk or sober.

There are indeed cases, to which I shall advert directly, wherein the party is held exempt, because he is moved to the alleged wrong by a desire so strong and imperious that no sanction could get the better of it.

The reason assigned by Blackstone,* and by various other writers, is hardly worth powder and shot.

He tells us that a wrong is the effect of a wicked will. And (says he) infants and madmen are exempted, because the act goes not with their will, or is not imputable to a wicked will.

Now in case the alleged wrong be wrought by action, it is clear that there must be a will going with the act, although the party may not be conscious of wrong. In case it be wrought negatively, it is true that the forbearance or omission does not *go* with a volition, or is not *directly* the consequence of a volition. But what would that matter, if the forbearance were accompanied by an unlawful intention, or the omission could be ascribed to culpable negligence?

By dint of much explanation, it is true that this jargon may be made intelligible. By the will of the party, Blackstone means (so far as he means anything) the state of the party's consciousness. By a wicked will, he means unlawful intention or culpable negligence. And he means that the alleged wrong is not imputable to either, when he says that it cannot be ascribed to a wicked will. And when he affirms, that the ground of every exemption is a want or defect of will, he means that the ground of every exemption is inevitable ignorance: inevitable ignorance of the law; or of the certain or probable consequences of the alleged wrong; or of the relation or connection between that alleged wrong and the law. He cannot mean to affirm, that an infant or madman has not as much *will* as the adult or the sane.

Nor is his position, thus translated, true. For, in certain cases (as I shall shew immediately), the party is exempt, although he is conscious of the law; of the nature and consequences of his own conduct; and of the relation or connection between his conduct and the law.

* Blackstone, (15th Ed.) Vol. IV. p. 20, *et seq.*

[*Vivâ voce.*]—I have stated that infancy or insanity are grounds of exemption, because the party may be ignorant of law. Nor does this contradict what I have said before, that ignorance of law is not a ground of exemption, or is only a ground of exemption in a few cases, according to the Roman Law.

For in the case of insanity and infancy, it is not a specific or distinct ground. The party is not exempted specifically and solely, on that ground.

[*Other grounds of exemption.*]

1. In our own law, Drunkenness would not seem to be a ground of exemption. (In civil cases, may release from *contract.*) In the Roman Law it was: provided, that is, the drunkenness itself was not the consequence of an unlawful intention.

Ultimate ground of exemption, same as in insanity or infancy.

Where unintentional drunkenness is *not* a ground of exemption, it is clear that the party is liable in respect of his heedlessness. He has no wrongful consciousness when drunk, but he might have known before he got drunk that it was not unlikely he should do mischief.

(And, here, I may observe that what I may style *remote* inadvertence is often a ground of liability. Explain remote inadvertence. Give examples.)

2. Ignorance of Law, where it is not inevitable.

3. I. Anger as a ground of mitigation or exemption. Anger may be such as to exclude all consciousness of the unlawfulness of the act. Or such as not to exclude, etc.; although it prompts to an act (accompanied by an unlawful intention) from which the party would otherwise abstain.

It is only in the first case, that anger is a ground of exemption according to the Roman Law. It exempts, as insanity exempts, and is indeed considered as a temporary madness.

Where anger does not completely suspend the use of the reason, and is yet a ground of mitigation, the ground of mitigation is not the absence of unlawful consciousness, but the absence of

deliberate intention. The disposition of the party is taken into consideration.

And (on the other hand) where anger which *does* suspend the use of the reason is not a ground of absolute exemption, the liability of the party arises from what I styled in my last Lecture, remote or indirect negligence.

4. *Imperitia:* In case of physician, referred to head of delicts: In case of judge, to quasi-delicts. In either case, ground of liability precisely the same; viz. assuming a station or profession without taking due pains to qualify.

All the exemptions from liability which I have now examined, may be referred to the same principles: viz. The party is not conscious, nor could he be conscious, that he is violating his duty. Consequently, the sanction could not operate upon his desires. But this principle will not account for every exemption. In certain cases, the sanction would operate upon his desires, but the performance of his duty does not depend upon his desires. By consequence, although the fear of the sanction would operate as a motive, it would operate to no purpose.

(*E.g.* Physical compulsion or restraint.)*

In other cases again, the sanction would operate upon the desires, and the performance of the duty may depend upon the desires of the party, but the party is affected with an opposite desire which no sanction could control. Here, the sanction is necessarily ineffectual.

I have talked of the various cases through which I have travelled, as exemptions. It were more correct to say that the party was *not obliged.* They are cases to which the notion of obligation cannot apply, because the sanction (which is the basis of obligation) is necessarily ineffectual:

Ineffectual, as not operating on desires: Or as operating in vain, because fulfilment does not depend upon desires; or because the fear inspired by the sanction is mastered and expelled by a motive which no sanction could control.

* Mühl., vol. i. § 105 (*Vis et Metus*). Bl. iv. Bent. 171. Feuerbach, Lehrbuch des peinlichen Rechts, pp. 83, 87. Pain, actual or impending, which is more imperious, as a determinative, than the fear inspired by the law.—*Marginal Note in Feuerbach.*

The application of the sanction, in such cases, would not answer the end for which the obligation is imposed.

II. I stated too roundly* that acquisitive prescription *in its direct form* is unknown to the Law of England.

In the case of prescription in a *que estate*, or of the acquisition by prescription of an easement *appurtenant*, the acquisitive prescription is direct. But this I believe is the only instance.

Easements in gross are (I believe) never acquired in that manner. Property or dominion, never. Certainly not real property. Not personal property. For, where it has been acquired *in effect* in that manner, possession is the evidence, and not prescription.

* See p. 183.

LECTURE XXVII.

HAVING endeavoured to explain the essentials of Injuries and Sanctions, and, therein, to illustrate the nature of obligations or duties, I will now advert to the differences by which sanctions are distinguished. If I attempted a complete examination of all these differences, the present inquiry would run to inordinate length: And those more important differences upon which I shall touch, will sufficiently suggest the others to the memory or reason of my hearers.

Sanctions civil and criminal.

And, first; Sanctions may be divided into *civil* and *criminal*, or (changing the expressions) into *private* and *public*.

As I remarked in a former Lecture, the distinction between private and public wrongs, or civil injuries and crimes, does not rest upon any difference between the respective tendencies of the two classes of offences: *All* wrongs being in their *remote* consequences *generally* mischievous: and most of the wrongs styled public, being *immediately* detrimental to determinate persons.

Viewed from a certain aspect, all wrongs and all sanctions are public. For all wrongs are violations of laws established directly or indirectly by the Sovereign or State. And all sanctions are enforced by the sovereign, or by sovereign authority.

But in certain cases of wrongs which are offences against rights, or (changing the expression) which are breaches of relative duties, the sanction is enforced at the instance or discretion of the injured party. It is competent to the deter-

minate person immediately affected by the wrong, to enforce or remit the liability incurred by the wrong-doer. And, in every case of the kind, the injury and the sanction may be styled *civil*, or (if we like the term better) *private*.

In other cases of wrongs which are breaches of relative duties, and in all cases of wrongs which are breaches of absolute duties, the sanction is enforced at the discretion of the Sovereign or State. It is only by the sovereign or state, that the liability incurred by the wrong-doer can be remitted. And in every case of the kind, the injury and the sanction may be styled *criminal* or *public*.

In some countries, the pursuit or prosecution of Crimes does not strictly reside in the sovereign or state, but in some *member* of the sovereign body. For instance, the pursuit of criminals resides in this country in the King; or, in a few instances, in the House of Commons. The proposition must therefore be taken with this qualification.

In short, the distinction between private and public wrongs, or civil injuries and crimes, would seem to consist in this:

Where the wrong is a *civil injury*, the sanction is enforced at the discretion of the party whose right has been violated. Where the wrong is a *crime*, the sanction is enforced at the discretion of the sovereign.* And, accordingly, the same wrong may be private or public, as we take it with reference to one, or to another sanction. Considered as a ground of action on the part of the injured individual, a battery is a civil injury. The same battery, considered as a ground for an indictment, is a crime, or public wrong.

The distinction, as I have now stated it, between civil injuries and crimes, must, however, be taken with the following explanations.

1st, In certain cases of civil injury, it is not competent

* See distinction between Civil Injuries and Crimes, in Lecture XVII.; On Absolute Duties.

to the injured party, either to pursue the offender before the tribunals, or to remit the liability which the offender has incurred. For example, An Infant who has suffered a wrong is not capable of instituting a suit, nor of renouncing the right which he has acquired by the injury. The suit is instituted on his behalf by a general or special Guardian: who (as a trustee for the infant) may also be incapable of remitting the offender's liability.

It were, therefore, more accurate to say, that where the wrong is a civil injury, the sanction is enforced at the instance of the injured, or of his representative; and that the liability of the offender (if remissible at all) is remissible by the injured party, and not by the sovereign or state.*

2dly, When I speak of the discretion of the sovereign or state, I mean the discretion of the sovereign or state as exercised according to law. For, by a special and arbitrary command, the sovereign may deprive the injured of the right arising from the injury, or may exempt the wrongdoer from his civil liability. [Herein lies the difference between governments of *law* and governments of *men*.] In one or two of the bad governments still existing in Europe, this foolish and mischievous proceeding is not uncommon. For example, Letters of Protection are granted by the government to debtors, and by these the debtors are secured from the pursuit of their creditors. But in cases of this kind, the sovereign partially abrogates his own law to answer some special purpose. This is never practised by wise governments, whether monarchical or other. The great Frederic, in spite of his imperious temper and love of power, always conformed his own conduct to his own laws.

Letters of protection were granted in this country by the King, so late as reign of William III.† These must have

* Observe; That, since the direct object of civil procedure is satisfaction to the injured rightee, no heed can be given to the disposition of the wrongdoer.

† See the case of Lord Cutts. 3 Lev. 332.

been illegal. For though the King is empowered by the Constitution to pursue and pardon criminals at his own discretion, he is not Sovereign. It is not competent to him to disregard the law by depriving the injured party of a right of civil action. In an analogous case, this has, however, been done by the Parliament.*

Public and private wrongs.

The distinction between private and public wrongs, is placed by some on another ground:

Where, say they, the injury is a crime, the end or scope of the sanction is the *prevention* of future injuries. The evil inflicted on the individual offender, is inflicted as a punishment, or for the sake of warning or example. In other words, the evil is inflicted on the individual offender, in order that others may be deterred from similar offences. Where the injury is civil, the end of the sanction is redress to the injured party.

Now, it is certainly true, that where the injury is treated as a crime, the end of the sanction is the prevention of future wrongs. The sanction is *pœna* or *punishment* (strictly so called): that is to say, an evil inflicted on a given offender in order that others may observe the law. Or (what is the same thing) the evil is inflicted on the given offender, by way of example, warning, or *documentum*: In order that others may be *reminded* of the evils threatened by the law, and may be convinced that its menaces are not idle and vain.

This is manifestly the meaning of the word example, when we speak of punishment being inflicted for the sake of example. We mean that the punishment is inflicted by way of caution or warning: for the sake of recalling to others the threats of the law. The word commonly used by Latin writers, and more especially by Tacitus, is *documentum*. If the evil did not answer this purpose, it would be inflicted to no end.

* See the case of Wright.

It is also equally true, that where the injury is considered civil, the proximate end of the sanction, *is*, (generally speaking,) redress to the injured party. But, still, the difference between civil injuries and crimes, can hardly be found in any difference between the ends or purposes of the corresponding sanctions.

For, first; Although the proximate end of a civil sanction, *is*, generally speaking, redress to the injured party, its remote and paramount end, like that of a criminal sanction, is the prevention of offences generally.

And, secondly; An action is sometimes given to the injured party, in order that the wrong-doer may be visited with *punishment*, and not in order that the injured party may be *redressed*. Actions of this sort (to which I shall advert immediately) are styled *penal*: In the language of the Roman Law, *pœnæ persequutoriæ*.

These propositions I will endeavour to explain.

It is quite clear, that the necessity of making redress, and of paying the costs of the proceeding by which redress is compelled, *tends* to prevent the recurrence of similar injuries; The immediate effect of the proceeding, is the restitution of the injured party to the enjoyment of the violated right, or the compulsory performance of an obligation incumbent upon the defendant, or satisfaction to the injured party in the way of equivalent or compensation. But the proceeding also operates *in terrorem*. For it is seen that the wrong-doer is stripped of every advantage which he may have happened to derive from the wrong, and is subjected to the expenses and other inconveniences of a suit.

Accordingly, a promise *not* to sue, in case the promisee shall wrong the promisor, is void (generally speaking) by the Roman Law: Although it is competent to a party who has *actually* suffered a wrong, to remit the civil liability incurred by the wrongdoer. And the reason alleged for the prohibition is this: That such a promise removes the salutary

fear which is inspired by prospective liability. A right of action is not merely considered as an instrument or means of redress, but as a restraint or determinative from wrong.

In short, the end or purpose for which the action is given is double: redress to the party directly affected by the injury, and the prevention of similar injuries: The accomplishment of the former, which is the proximate purpose, tending to accomplish the latter, which is the remote and paramount.

Assuming, then, that the redress of the injured party is always one object of a civil proceeding, it cannot be said that civil and criminal sanctions are distinguished by their ends or purposes.

It may, however, be urged, that the prevention of future injuries is the sole end of a criminal proceeding; whilst the end of a proceeding, styled civil, is the prevention of future injuries *and* the redress of the injured. But even this will scarcely hold. For in those civil actions which are styled *penal*, the action is given to the party, not for his own advantage, but for the mere purpose of punishing the wrongdoer.

In the Roman Law, actions of this kind are numerous.

For example; Theft is not a crime, but a private delict: But besides the action for the recovery of the thing stolen, the thief was liable to a penalty, to be recovered in a distinct action by the injured party.

So, again, if the heirs of a testator refused to pay a legacy left to a temple or church, they were not only compelled to yield "ipsam rem vel pecuniam quæ relicta est, sed aliud, pro *pœnâ*."

There are (I think) cases of the kind in our own law, though I cannot at this instant recall them. In such cases, the end of the action is not redress, but prevention.

LECTURE XXVIII.

[Several pages of the MS. are here wanting.—*S. A.*]

Written and unwritten law *sensu* Roman Lawyers.*

By the Roman Lawyers, little importance appears to have been attached to the distinction between written and unwritten law. And, in every instance in which they take the distinction, they understand it in its literal sense. When they talk of *written* law, they do not mean law proceeding directly from the supreme Legislature, but law which was committed to writing at its origin: *quod ab initio literis mandatum est.* And accordingly they not only include in written law, the laws of the *Populus* and *Plebs,* with the Senatus-consulta and Constitutions of the Emperors, but also the Edicts of the Prætors and other Magistrates, and the responses of the Jurisconsults.

Law originating in custom, or *ex disputatione fori*, they style *jus non scriptum.* For law originating in custom, or floating traditionally amongst lawyers, is not committed to writing *ab initio,* although it may afterwards be recorded in legal treatises, or may be adopted by the supreme legislature and promulged in a written form.

Gaius, in his enumeration of the sources of Law, passes over the distinction in silence. He says, "Constant autem jura ex legibus, plebiscitis, senatus-consultis, constitutionibus Principum, edictis eorum qui jus edicendi habent, responsis prudentum."† He afterwards speaks of Customary

* Dig. (1. 1. 7.) 2. 12. † Gaii Comm. i. 2.

Law, or of the "jus quod consensu receptum est;" and also of *Mos* as a source of law. But he nowhere adverts to writing, or to the absence of writing, as forming a ground of distinction between the species of laws.

The distinction (if such it can be termed) which was taken by the Roman Lawyers, is altogether insignificant: Insignificant, inasmuch as commission to writing, *by, or by authority of immediate author*, is an accident; though no considerable body of law can be preserved and known, unless written, with or without authority.

That which has been taken by the moderns is important. But nothing can be less significant or more misleading than the language in which it is conveyed. For, first, law, though it originate with the supreme legislature, is not necessarily written. It may be, and in many nations has been, established and promulged without writing. And, on the other hand, law flowing from another source, though obtaining as law with the consent of the supreme Legislature, may be committed to writing at its origin. Such, for instance, are the laws of Provincial and Colonial Legislatures. And such especially (as I shall shew hereafter) were the edicts of the prætors.

Example of *written law* in the juridical sense of the term, and as the term is applied by modern civilians to the *leges*, etc., of the Roman Law.

The term *written* law in its juridical and improper meaning, is applied by Civilians of the middle, and of more recent ages, to the *leges* passed by the Roman *Populus*, to Plebiscita (or *leges* passed by the *Plebs*), to Consults of the Senate, and to the Constitutions of the Emperors or Princes: the respective natures of which several species of laws (inasmuch as I shall often refer to them at subsequent points of my Course) I will endeavour to describe here.

Preface to Law considered with reference to sources and modes.

In Rome, under the Commonwealth, or *in liberâ republicâ*, laws established immediately by the supreme legislature were of three kinds:—first,

laws made by the *populus*, assembled in *curiæ* or in *centuries*; 2dly, laws made by the *plebs*, assembled in tribes; and 3dly, laws made by the *senate*.

Strictly speaking, the sovereignty resided in the *populus*; which included every Roman invested with political powers, and therefore included members of the *senate*, as well as citizens who were not senators. To laws made by the *populus* (whether assembled in *curiæ*, according to the more ancient manner; or in *centuries*, according to the more recent fashion), the term "*leges*" or "*statutes*" (when used with technical exactness) was exclusively applied. But as the term "*leges*" or "*statutes*" was afterwards extended improperly to laws made by the *plebs*, "*leges*" strictly so called, or laws made by the *populus*, were commonly styled, for the sake of distinction, "*Leges curiatæ*" or "*Leges centuriatæ*."

The *plebs* (as distinguished from the *senate*) included all citizens of plebeian birth who were not senators.

The *senate* (as distinguished from the *plebs*) included all citizens of patrician birth, and also all citizens of plebeian birth who filled (or had filled) certain of the higher offices. For example; Consuls, prætors, and tribunes of the *plebs*, together with *ex*-consuls and *ex*-prætors, were members of the assembly styled the *senate*, whether they were patricians or plebeians.

The distinction between *patrician* and *plebeian*, and the distinction between *senate* and *plebs*, were therefore disparate. For, although every patrician seems to have been a senator, many of plebeian birth sat and voted in the senate.

A law passed by the *plebs*, was styled, in accurate language, a *plebiscitum*. But as every *plebiscitum* was equivalent to a *lex*, the term "*leges*" was extended *improperly* from laws made by the *populus* to laws made by the *plebs*.

How *plebiscita* acquired the force of *leges*, or came to be considered as laws made by the supreme legislature,

it is not very easy to determine. For the *plebs* was only a portion of the whole Roman People, and therefore was not the body wherein the sovereignty resided. It seems not unlikely, that the *plebs* (instigated by their Tribunes) assumed the power of legislating for the whole community: and that the senate (too feeble to resist) yielded, after a struggle, to the unconstitutional pretension. Gaius tells us expressly, that the senate at first refused to recognize *plebiscita* as *leges* generally binding; but that the force of *leges* was at length imparted to *plebiscita* through a law passed by the *populus*.*

It also seems probable (as some recent writers have supposed) that every *plebiscitum* was prepared by the *senate* before it was passed by the *plebs*. And, if that supposition be just, every law of the kind was made with the concurrence of *both*, and was nearly equivalent to a *Lex*, or statute made by the entire people. The power of supreme legislation, instead of being exercised by the *populus* assembled in a single body, was exercised by two bodies into which the *populus* was divided. One of these bodies (namely the *senate*) possessed the *initiative*, or the power of *proposing* laws. The other of these bodies (namely the *plebs*) possessed the power of passing or rejecting laws concocted and proposed by the senate.

Laws passed by the senate (which were styled *senatus-consulta*) were also equivalent to *leges* made by the assembled *populus*.

It has often been inferred from a passage in Tacitus, that consults or acts of the senate first acquired this virtue under the reign of Tiberius. But they are distinctly placed by Cicero (writing *liberâ republicâ*) on a level with *leges* and *plebiscita*. Nor is there here the slightest difficulty. For, since the tribunes of the *plebs* sat in the senate, and by simply uttering their *veto* might have arrested its proceedings, it follows that a consult of the senate was passed with

* Gaii Comm. i. 3.

the concurrence of the *plebs*, assenting to the act by its representatives.

The result then seems to be this:

Liberâ republicâ, or during the Commonwealth, the supreme legislative power resided in the Roman *People* (including the *senate* and *plebs*).

This legislative power was sometimes exercised by the people, as collected in a single assembly. At other times, it was exercised by the same people as divided into two bodies:—namely, *by* the *plebs*, with the concurrence of the senate; or *by* the senate, with the concurrence of the *plebs*. And, in either of these last-mentioned cases, the joint act of the parts into which the whole was divided, was equivalent to an act of that sovereign whole as united in one assembly.*

If the sovereignty resided in the Lords and Commons, sometimes sitting in one house, and sometimes sitting in two houses, our own supreme legislature would closely resemble the Roman. A *statute* passed by both sitting in one house, would be *Lex*. An *ordinance* made by the Lords sitting in a distinct house, and confirmed by the Commons sitting in a similar manner, might be styled *senatus-consultum*. And, on the other hand, an ordinance made by the Commons sitting in a distinct house, and confirmed by the Lords sitting in the like manner, would be *plebiscitum*.

In any of the three cases, the act of the single assembly, or the act of the distinct but concurring assemblies, would be the act of the supreme legislature, or of that composite body wherein the sovereignty resided.

So long, then, as the Commonwealth virtually existed,

* [Difficulty. The members of the equestrian order, though members of the *populus*, were not members of the *senate*, nor of the *plebs*. By consequence, a joint act of the *senate* and *plebs* was not completely the act of the whole *populus*: though an act of the *populus*, united in *curiæ* or *centuries*, was.]

law created immediately by the supreme legislature was established in three modes:—by *leges*, or *statutes*, strictly so called; by *plebiscita*, also styled *leges*; and by *senatus-consulta*. After the dissolution of the Commonwealth and the establishment of the Empire, the supreme legislative power, though it virtually resided in a monarch, was long exercised *to appearance* in the ancient and constitutional modes. Laws were still made by the *populus*, *plebs*, or *senate*, although those bodies were obedient instruments of the Emperor, and legislated at his suggestion, or at the suggestion of his creatures. As assemblies of the *populus* or *plebs* were the less commodious tools, the work of supreme legislation was commonly done to appearance by the smaller and more manageable body. The laws which really emanated from the military chief of the Empire, were usually voted by the senate *at the instance of the prince*, ("ad orationem principis,")* and were promulged or published as *senatus-consulta*.

From the accession of Hadrian, and perhaps from an earlier period, the Emperors openly assumed the supreme legislative power which they had before exercised covertly. Instead of emitting their laws through the *populus*, *plebs*, or *senate*, they began to legislate avowedly as monarchs and autocrators, and to notify their commands to their subjects in *Imperial Constitutions*.

These imperial constitutions (which are not unfrequently styled *principum placita*) were general or special.

By a *General* Constitution (*edictum*, *lex edictalis*, *epistola generalis*) the emperor or prince, acting in his legislative capacity, established some law or rule of a universal or general character: that is to say, not regarding specifically a single person or case.

Special constitutions were of various kinds, but agreed in this: that they regarded specifically single persons or

* (*v. v.*) *Princeps*, what. The title invariably given by Tacitus. *Imperator*, what.

cases. And the most important and remarkable of all these special constitutions, were those *decretes* and *rescripts* which were made by the Emperors,* not in their quality of sovereign legislators, but in their quality of sovereign judges: a *decrete* being an order made on a regular appeal from the judgment of a lower tribunal; and a *rescript* being an order preceding the judgment of the lower tribunal, and instructing that lower tribunal how to decide the cause.

By a Special Constitution of another class, the Emperor conferred on some single person some anomalous or irregular right, or imposed upon some single person some anomalous or irregular obligation, or inflicted on some single person some anomalous or irregular punishment. Such constitutions were styled *privilegia*. Or, speaking more accurately, such constitutions were *privilegia* issued by the Emperors. For a *Lex* or *Senatus-consultum* of the same purport or effect, would also have been a *privilegium*. When such *privilegia* conferred anomalous rights, they were styled *favourable*. When they imposed anomalous obligations, or inflicted anomalous punishments, they were styled *odious*. An act of the British Parliament giving to the inventor of a machine an exclusive right of selling it, would be styled in the language of the Roman Law "a favourable privilege." An Act of Attainder would be styled in the same language "an odious privilege."† Privilegia.

To laws, then, of the *species* whose natures I have now

* For example, an ordinary or extraordinary *mandate* (—a special constitution of a certain class) was an order addressed by the Emperor to a Civil or Military officer, for the purpose of regulating his conduct in the general exercise of his office, or for the purpose of determining his conduct on a particular occasion.

Like the rescripts of the Roman Emperors, the canon laws or decretal epistles of the Popes are all rescripts in the strictest sense.

† A *privilegium* is an Act of the supreme Legislature, specially affecting a single person with an anomalous advantage or burthen: *Etymon, Privus*

described, Civilians of the middle and of more recent ages applied the term *written* law in its *juridical* and improper meaning, *because* they were laws (statute or judiciary) emanating from *sovereign* sources.

Examples of *unwritten* law *s. j.*, as the term is applied by modern Civilians to the *Jus Prætorium*, etc., of the Roman Law.

On the other hand, the term *unwritten* law, in its *juridical* and improper meaning, is applied by the same Civilians to the *Jus Prætorium:* that is to say, to the rules of equity, made by the Prætors through their general edicts, and in their properly legislative capacity. For though such rules were *written* (in the *grammatical* sense of the expression), and moreover were *promulged* or *published*, they yet proceeded immediately from *subordinate* authors.

And the term *unwritten* law, in the same *juridical* meaning, is applied by the same Civilians, for the same reason, to the rules of *judiciary* law which were engendered by the *usus fori:* that is to say, which were immediately created by the Prætors, and other subordinate judges, as directly and properly exercising their *judicial* functions. It also is applied by the same Civilians, to *jus moribus constitutum*, and *jus prudentibus compositum:* that is to say, to law emanating, (or *supposed* to emanate,) from opinions emitted by respected, but merely private jurisconsults, in responses, in commentaries, or in systematical treatises.

For assuming that customary law obtains *as positive law* by virtue of the *consensus utentium*, it immediately proceeds, *as such*, from subject members of the community. And as-

et *Lex*. From *privus*, *privatum* as opposed to *publicum*. *Privatum* regarding persons as considered singly; *publicum* regarding persons as considered collectively, and as forming an independent society or other community.

In English Law language, privilege rather denotes a peculiar right, than an *act* conferring a peculiar right or imposing a peculiar obligation. Sometimes it seems to be equivalent to *right*.

Obs. That though a *privilegium* regards a single person, it also regards the whole community. [Exemplify.] Hence the negative definition of a General Constitution which I gave above.

suming that private lawyers are properly *authors* of law, by reason of the influence of their opinions on supreme or inferior legislatures, the law of which they are the authors emanates from *subordinate* sources.

But (as I shall shew hereafter) these two species of law are *species* of *judiciary* law: owing their existence *as positive law* to sovereign or inferior judges; although they are shaped, by the judicial legislators, on customs current in the community, or on opinions of private jurisconsults.

Laws autonomical.

The same remarks will also apply to the laws which are styled by writers on jurisprudence *autonomical:* that is to say, which are made by private persons (in the way of contract or otherwise) by virtue of rights or capacities wherewith they are invested. And, accordingly, Laws *autonomical* are *un*written law (in the juridical meaning of the term).

Promulged and unpromulged law.

The distinction between *written* and *unwritten* law, in the *juridical* meaning of the terms, is also denoted in the writings of the same Civilians, by the opposed epithets *promulged* and *unpromulged.*

But *promulged* and *unpromulged,* as thus applied, are not less misexpressive than *written* and *unwritten* (*sensu juridico*):

For, *first,* laws established immediately by sovereign authors are not necessarily *promulged:* that is, published, or made known, orally or in writing, for the information and guidance of those who are bound to obey them.

In this country, a Bill, which has passed the two Houses, *is* a statute, or becomes *obligatory,* from the moment at which it receives the Royal Assent. The concurrence of the various members which compose the supreme legislature (as that concurrence is completed by the royal assent) is the only sign given to the subject community. No promulgation is requisite. *Because* (as Blackstone remarks) every man in England is, *in judgment of Law,* party to

the making of an Act of Parliament: "He being present thereat by his representatives."

According to the practice, which obtained under the Roman Emperors, their *general* or *edictal* Constitutions were not binding until they were published. And, hence, it probably has happened, that modern Civilians have applied the term "*promulged*" to Laws proceeding immediately from sovereign authors. But the rescripts of the Emperors, with others of their *special* constitutions, were exclusively addressed (for the most part) to the particular or determinate persons whom they specifically regarded. And yet, through these special constitutions, Law was established, *immediately* by those sovereign princes, in their judicial (or legislative) capacity.

And (*secondly*), as Law made immediately by a sovereign author is not necessarily promulged, so Law may be promulged though it emanates from a subordinate source. Such, for example, was the case with the Law or Equity of the Prætors; whose Edicts were published carefully and conspicuously, in order that all, whose interests they might touch, might know their provisions and regulate their conduct accordingly.

And here I may remark, that the expression *promulgare legem* had not originally its present import.

According to the meaning *now* annexed to the expression, "to *promulge* a law," is to publish a law already made, in order that those whom it binds may know its existence and purport. According to the meaning *originally* annexed to the expression, "to *promulge* a law," was to submit a *proposed* law to the members of the Legislature, in order that they might know its contents and consider the expediency of passing it.

Such was the meaning of the expression, in the language of Roman Jurisprudence, during the Commonwealth. Under the Emperors, the expression acquired the sense which is now universally attached to it.

The distinction between *written* and *unwritten* law (in the juridical sense of the terms), and the distinction between *written* and *unwritten* law (in the *grammatical* sense of the terms), are disparate and cross distinctions: The former resting on a difference between the *sources* of law: the latter, on a difference between the *modes* in which it *emanates* from its sources. Written and unwritten law, *sensu grammatico.*

According to the distinction, in the *grammatical* sense of the terms, *any* law (whether it be statute or judiciary; or whether it emanate from a sovereign, or a subordinate source;) is *written* law, (*or jus quod scripto venit,*) if it be written, at the time of its origin, by the authority of its immediate maker. If it be not so written, it is *unwritten* law, or *jus quod sine scripto venit.*

Such, at least is the *only* distinction between *written* and *unwritten* law, that is known to the Roman Lawyers; as clearly appears from their use of the expressions. They rank with *written* law, the *leges* of the *populus* and *plebs*, the consults of the senate, and the constitutions of the Princes or Emperors; all of which, it is true, are *written* law, in the *juridical* sense of the term.

But they also rank with *written* law, the Equity of the Prætors; which, taking the term in its *juridical* sense, is *unwritten* law. They also rank the *responsa prudentum* (or the opinions of private jurisconsults) with *written* law; inasmuch as those opinions were emitted by their authors *in writing:* Though, assuming that those private jurisconsults were properly authors of law, the law arising from their responses is necessarily *unwritten* law, in the *juridical* meaning of the expression.

Customary Law (according to the Roman Lawyers) is *non scriptum.* For, assuming that customary law obtains as *positive law* by virtue of the *consensus utentium,* it naturally originates *sine scripto.*

Law originating in the *usus fori,* or made by subordinate

tribunals through judicial decisions, is not referred by the Roman Lawyers to either class.

But I would remark, that it may belong to *either* class (taking the opposed terms in their *grammatical* sense). If the decisions of the tribunals were committed to writing by *authority* (in the manner proposed by Lord Bacon), law established by such decisions would be written law. If they are *not* committed to writing (or are committed to writing by private and unauthorized reporters) the law established *by* them is unwritten.

Written and unwritten law *sensu* Hale and Blackstone.

The distinction between written and unwritten Law (as drawn by modern Civilians) has been adopted by Sir Matthew Hale in his history of the Common Law, and imported by Sir William Blackstone into his Commentaries. By these writers on English Law, the terms "*written* law" and "*unwritten* law" are apparently taken in their *juridical* meanings. They both of them restrict the expression *leges scriptæ*, or the written laws of this kingdom, to "statutes, acts, or edicts, made by the King's majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in parliament assembled." General and particular customs, together with laws established by the practice or usage of Courts, they refer to the *leges non scriptæ*, or unwritten law.

It must, however, be remarked, that they seem to confound the distinction *sensu juridico* and the distinction *sensu grammatico;* and, by consequence, to arrive at a division of law which is incomplete and perplexed.

Speaking of the unwritten Law, Blackstone says, "I style these parts of our Law *leges non scriptæ, because* their original institution and authority are *not set down in writing*, as Acts of Parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom."

Now (according to this) the division of Blackstone and Hale stands thus.

Acts of the supreme Legislature are *leges scriptæ:* (Whether as made immediately by the supreme Legislature, or as set down in writing by the authority of the makers, does not distinctly appear).

But any law (*not* created immediately by the supreme Legislature) is *non scriptum:* Provided, that is, that its original institution be *not* set down in writing.

Now (according to this division, in which the two distinctions are manifestly confounded) what becomes of laws made immediately by subordinate Legislatures? as, for instance, by the Irish or Colonial Legislature, or by Courts of Justice (making rules of practice)? These *are* set down in writing by their immediate authors, and are *not* created immediately by the supreme Legislature. Consequently, they cannot be brought under either member of the division as it has been conceived by Blackstone and Hale.

And what would be the class of the judiciary law recorded in the Year-books? Or what would be the class of the law recorded in any of the reports, in case Lord Bacon's suggestion had met with the attention due to it; and the decisions of every tribunal had been recorded by authorized reporters?

Imperfect delegation by sovereign of judicial powers, in nations of antiquity and Middle Ages.

Judicial powers, like all other powers, are implied in Sovereignty, although they are commonly delegated wholly or in part. In the nations of antiquity, and in the Middle Ages, the same individual or body, which constituted the supreme Legislature, was commonly Judge in the last resort, or even in the first instance. E. g. The Roman people, in Criminal cases: The Saxon *Mickle-mote* or *Wittenagemote*: The *Aula Regis* or Great Court Baron of the Kingdom, which, after the Conquest, was the Sovereign or supreme Legislature, and of which our present House of Lords is merely a fragment.

There is (I think) one case* (to which I shall advert hereafter) wherein our present Parliament (meaning King, Lords and Commons) may also be considered as a Court of Justice. But, with ourselves, the judicial powers have been more completely detached from the *supreme* legislative powers than in most other nations.

Examples of law *not* made by the supreme Legislature.

Having given examples of law made by the sovereign, I proceed to examples of law *not* made by the sovereign, although it exists or obtains *as law* by the express or tacit authority of the supreme Legislature.

And, first, laws made by subordinate legislatures, in the direct or legislative manner, are not established *immediately* by the *supreme* legislature, although they derive their force from the *authority* of the sovereign. Such were the laws made by the Irish Parliament before that act of the British Parliament which acknowledged the independence of Ireland. In fact and practice, the Irish Legislature (consisting of the King and the Irish Houses of Parliament) was in a state of subjection to the supreme Legislature of Britain: that is to say, to the same King and the British Houses of Parliament. An Act of the British Legislature bound the inhabitants of Ireland, if the Act contained a provision extending it to that country. And acts of the Irish Legislature might have been abrogated or modified by acts of the British.

Laws made by the Irish Parliament, Colonial Assemblies, Collegia.

Laws made by *Collegia*, or by Corporate bodies, belong to the same class. They are made immediately by the Corporate bodies themselves, but owe their legal validity to the authority of the sovereign.

The power of subordinate legislation granted to a subordinate legislature, is conferred by the sovereign legislature expressly or tacitly.

* Blackstone, iv. 84, 85.

If it be granted or admitted by written or oral declaration, it is conferred by the sovereign *expressly*.

The sovereign confers it *tacitly*, by any conduct (not consisting in such declaration) which necessarily supposes that he acknowledges or admits it. For example, if he enforce a law made by a subordinate legislature, or permit his Courts of Justice to enforce that law, his positive or negative conduct necessarily supposes that he acknowledges a power of legislation in the immediate author of the law.

Another species of laws not made by the supreme legislature, are laws (if such they can be called) which are established by private persons, and to which the supreme legislature lends its sanction. These (in truth) are nothing but obligations imposed by virtue of rights which the legislator has conferred. For example, By my will I may impose certain conditions upon devisees or legatees. By virtue of a contract, the contracting parties impose upon one another certain obligations. As a father or guardian, I may prescribe to my child or ward certain conduct, which the Courts of Justice will compel him to follow. Laws Autonomical.

I would briefly remark, in conclusion, that every possible law, or rule of law, is, on the one hand, *statute* or *judiciary* law, and, on the other hand, *written* or *unwritten* law (in the *juridical* meanings of the terms): Or, in other words, that it emanates, in the way of *direct*, or of *judicial* legislation, from a *sovereign* or *subordinate* source.

NOTES.

In modern Europe, or in some countries of modern Europe, the so-called *jus receptum* is deemed *written* Law, if it existed in writing before and at its adoption.

If Law exist in writing before and at its origin, it is also written law (*sensu grammatico*) although it be not written by its authors.

[Two Species:

1. Committed by its authors to writing at the moment of its birth:

2. Existing in writing at the moment of its adoption.*

Called *written law*, though not written *as received*, if written *when adopted.*

For example, The Roman Law, as it obtained in France, did not obtain *as* Roman Law, but because it was adopted by the French tribunals.† It was nevertheless styled "Droit *écrit*," because it existed in a written shape when it was adopted as Law by the Parliaments.]

Jus receptum: With respect to this, Law has *sometimes* been supposed to obtain independently of sovereign authority.

It may be fashioned on { Foreign positive Law, *or* International Morality.

The term "jus receptum" has even been extended to customary law.

* Is not of necessity, then, "litteris mandatum ab initio" by, or by authority of, its immediate authors.

† *Jus Romanum*, as opposed to *Jus Feudale*, is also styled (Lib. Feud.) "written law" (in same sense).

Jus scriptum (s. j.) : Law which obtains through the special and expressed pleasure of the (sovereign) legislator:—Leges; Plebiscita; Constitutiones Principum; Senatus-Consulta, Edicta magistratuum; Responsa prudentum: Usus fori: Mos: Jus gentium. Leges autonomiæ.

Jus non scriptum. (s. j.)

Obtaining through the express, but *general* pleasure of the (sovereign) legislator.	Obtaining through the general or special, but tacit, pleasure, etc.

(Marginal Note in *Thibaut, Versuche,* vol. i. p. 3.)

"Die leidige Eintheilung in *jus scriptum* und *non scriptum* (s. j.) lasse ich hier im Text ungerügt passiren, weil sie in der Sache selbst richtige und brauchbare Begriffe aufstellt: obgleich ich überzeugt bin, dass sie allein einem groben Irrthum der neueren Juristen ihren Ursprung verdankt. Hätten die Römer, bei denen zufällig das niedergeschriebene Recht publicirtes Recht war, *das publicirte* von dem nicht publicirten Recht unterscheiden wollen; wie war es denn möglich, dass sie auf den tollen Einfall geriethen, das publicirte Recht *jus scriptum* zu nennen? Mit dieser Frage muss die ganze Eintheiling der Neueren fallen."—*Thibaut, Versuche,* vol. ii. p. 234.

Hugo, speaking of "*promulgatio* in the modern sense," (i.e. by means of printed or written documents) says, that these can only be known to "gewisse Stellvertreter des Volks, d. h. an Die welche lesen können oder sich es vorlesen lassen; und die tägliche Erfahrung lehrt, wie wenig ein Gesetz blos durch dieses absichtliche Bekanntmachen wirklich allgemein bekannt wird, so lange es nähmlich noch nicht ins tägliche Leben übergegangen ist." Hugo, Enc. p. 25.

i. e. A law is not known because it is promulged. Nor is unwritten law known because it is established. On the contrary, the means of knowing the last are more defective than the means of knowing the first.—*Marginal Note.*

[The following references are pencilled in a blank leaf at the end of this Lecture.—*S. A.*]

For the distinctions between written and unwritten law (*sensu jur.*) and the equivalent distinction between promulged and unpromulged law, together with the former distinction (*sensu gr.*), see—

Gaius, in pr.; Inst. in pr.
Haubold, Inst. pp. 5, 12.
Hugo, Enc. 12, 24–21, 116, 185.
——— Gesch. 100. 340, 379, 387, 674–9, 968, 1022.
Falck, 15, 299.
Savigny, Vom Beruf, 28 *et seq.*, 88.
Bentham, Traités, etc., 321.
Thibaut, Versuche, i. 111; ii. 234.
Blackstone, i. 45, 59; iii. 327.

Sorts of written Law.

Hugo, Enc. 116. Gesch. 100.
Savigny, Vom Beruf, 17.
Blackstone, 46, 84, 101–6, 270, 415, 475.

Unwritten Law.

Hugo, Enc. 19, 24–8, 116, 204.
——— Gesch. 100, 396, 738.
Mill, 24, 25.
Savigny. Vom Beruf, 12–24, 74.
Falck, 16.
Blackstone, i. 63; iii. 122.

LECTURE XXIX.

[Nearly the whole of this Lecture is cut out, nor have I been able to find any matter which the author might have intended to substitute for what he rejected. The contents of the five following pages must therefore be regarded as fragments.—*S.A.*]

Fontes Juris.

In legal Treatises (and especially in Treatises expounding the Roman Law), that department or division which regards the *origin* of laws, is frequently entitled "De juris *fontibus*."

As proceeding from *immediate* authors of different characters or descriptions, laws are talked of (in the language of metaphor) as if they arose and flowed from different fountains or sources. In other words, the *immediate* author of a given Rule (whether that author be the Sovereign, or any individual or body legislating in subordination to the Sovereign), is styled the fountain, or the source, from which the rule in question springs and streams.

The talk is fanciful rather than just.

For, applying the metaphor with the consistency which even poetry requires, rules established *immediately* by the supreme legislature are the only rules springing from a *fons* or source. Individuals or bodies legislating in subordination to the sovereign, are rather *receptacles* fed by the supreme legislature, and emitting the borrowed waters which they receive from that Fountain of Law.

Taken in the sense to which I have now adverted, the fountains or sources of laws are their *immediate* authors or makers.

In another acceptation of the term, the fountains or sources of laws are not their immediate authors, but the earliest extant monuments, or earliest extant documents, from which the existence or purport of laws may be known or conjectured.

Taken in this acceptation, the fountains or sources of *laws* are properly sources of the *knowledge* which is conversant about laws:—"fontes e quibus juris *notitia* hauritur."

But the term "*fontes*" (as thus understood) is restricted to the original, or to the earliest extant documents. Documents which are copies of these, or which give at second-hand the evidence contained in these, are not *fontes* or sources of knowledge, but *rivi* or conduits through which it emanates from the sources.

For example;—Considered in mass, all the relics of antiquity, which regard the Roman Law, are "*fontes* juris Romani:" "*fontes* e quibus juris Romani *notitia* hodie hauritur." For (speaking generally) the extracts from the Classical Jurists contained in Justinian's Digest, the Imperial Constitutions contained in his Code, with such other relics of antiquity as regard the Roman Law, are the earliest evidence, or the earliest extant evidence, for the several parts of the system to which they respectively relate.

These, therefore, are fountains or sources.

But the works of the Glossators and Commentators who wrote in the Middle Ages, with the works of Civilians who have written in subsequent periods, are *not* fountains or sources of that knowledge of the system which may be gotten at the present hour. For the countless authors of those countless volumes derived their own knowledge of the Roman Law from ancient documents or monuments which are still extant and accessible. Accordingly, the works of the Glossators and Commentators who wrote in the Middle Ages, with the works of Civilians who have written in subsequent periods, are commonly distinguished from

the documents which constitute the *fontes* or sources, by the general and collective name of "*Literatura.*"

The term "fontes juris" has therefore a double signification.

As proceeding from *immediate* authors, of various characters or descriptions, laws are said to emanate from various *sources* or *springs:* Whilst the earliest extant documents which attest their being or purport, are also entitled "*sources* or springs of *law,*" or sources or springs of the *knowledge* which is conversant about it.

And so, (in regard to the *English* Law,) the statutes, the reports of judicial decisions, with the old and authoritative treatises which are equivalent to Reports, may be deemed *sources* of English jurisprudence; whilst the treatises on the English law, which merely expound the matter of those statutes and reports, are not *sources* of English jurisprudence, but are properly a legal literature drawn or derived from the *sources.*

Extension of "source" to every "remote cause" of Law.

Taking the term "source" in a loose signification, Customs may be styled *sources* of laws. For the existence of a custom, with the general opinion in favour of it, is the cause or occasion, or is one of the causes or occasions, of that legal rule which is moulded or fashioned upon it. But taking the term "source" in the same loose signification, the causes of the custom from which the law emerges are also a source or fountain of the law itself: And, generally, any cause of any law must be ranked with its sources or fountains.

Accordingly, certain writers (as I shall shew hereafter, when I come to Natural Law) have ranked experience and reason, together with the external circumstances wherein mankind are placed, amongst the sources of the laws whereby mankind are governed.

A happier *reductio ad absurdum* of the position maintained by those writers could hardly be devised.

Auctoritas Prudentum, Authority of Conveyancers, etc., are in the same predicament as Customary Law. So of *Practices of Lawyers*, etc. But if by "source" be meant the legislative authority from which law proceeds, they are not *sources* although they are *causes*. If you like, you may indeed extend the word "sources" to these, but then you ought also to extend it to any cause whatever which leads to the establishment of Law: *e. g.*: Reasons assigned in debate; the particular incidents which have occasioned certain laws, etc.; any circumstance, in short, which determined the Legislator or Judge to create the rule. As we have already endeavoured to shew, there can be no law without a legislative act; and for the sake of distinctness I should wish to limit the word "sources" to the legislative power by which Law is established; and to designate the causes which lead to its establishment by the word "causes" or by some equivalent expression.

"Written and Unwritten" should not be substituted for "Direct and Oblique."

. . . . And here I beg leave to interpose a short remark.

In my sketch or outline of these Lectures, I applied the opposed terms "written Law and unwritten Law" to the distinction between law established *directly* and law introduced *obliquely*: Though (as I have shewn in the two preceding discourses) *that* is not the distinction which the terms are *used* to denote.

The reason which led me to apply them in this unusual manner, I will briefly explain hereafter. I am now convinced, that that reason is *insufficient*: that the longest circumlocution is preferable to a new term, or to the use of an old term in a new meaning. (That is to say, unless the new term, or the new use of the old one, be introduced by some person who can give it notoriety and currency.)

Accordingly, as no short names are afforded by esta-

blished language, I shall indicate the distinction in question by periphrasis or circumlocution.

For example; Law belonging to *one* of the kinds in question, I shall style, "Law established *directly;*" "Law established in the *legislative* manner;" or "Law established in the way of *proper* legislation:" That is to say, established immediately by the sovereign, or by any subordinate author, as properly exercising *legislative*, and not *judicial* functions. (As *gesetzgebend*, and not as *richtend*.)

Laws belonging to the *opposite* kind; I shall style, "Law introduced and obtaining *obliquely;*" "Law established or introduced in the *judicial* mode;" or "Law established or introduced in the way of *judicial* legislation:" That is to say, introduced immediately by the sovereign, or by any subordinate author, as properly exercising *judicial*, and not *legislative* functions. (As *richtend*, and not as *gesetzgebend*.)

Law of this latter kind (or rather, perhaps, a certain sort of it) has been styled by Mr. Bentham "*Judge-made* law:" —a term pithy and homely, and which I therefore love, but which nevertheless I am constrained to reject.

For, first, it does, in some sort, smack or savour of disrespect. And, as I cannot concur with Mr. Bentham, in his sweeping dislike of law made by judges, I cannot consent to mark or brand it with a name importing irreverence.

Secondly, It tends to confound the *sources*, from which law immediately proceeds, with the *modes* in which it originates. The term "Judge-made law" would seem to denote law *made by subject judges*, as opposed to law made by the sovereign Legislature. At least, it would seem to denote law made by subject judges *as exercising their judicial functions:* which (I believe) is the sense annexed to the expression by Mr. Bentham.

Now (as I shall endeavour to shew in a future Lecture) the *important* difference is the difference of *modes*, and not the difference of *sources*. Provided it be made in the *direct*, or in the *legislative* manner, law, established immediately

by subject judges, is just as good as law emanating immediately from the sovereign.

Nay, judges legislating avowedly in the manner of the Roman Prætors, might do the business *better* than any of the sovereign Legislatures which have yet existed in the world.

Notes.

Sources of Law (Fontes juris) is an ambiguous expression. It may mean the legislative act (or the legislative power) by which law is created, or the documents by which its creation is known. In the first sense, the Supreme Legislature is a source of Law; soa re Courts of Justice, since by them (as will be shewn immediately) much of the law which obtains in almost every country is established indirectly. In the second sense, the written or printed acts of the Legislature are sources; since through them our knowledge of the rules which the Legislature establishes is derived. In the same sense, the authorized or unauthorized Reports of judicial decisions are sources of unwritten (and sometimes of written) law.

Sources of Law in the last sense, are not sources of *Law*, but sources of *Knowledge* of Law.

[Instances of these are; Reports of Cases: Treatises in which decisions or laws are preserved.]

The difference between the two is this: "Source," in the former sense, is the authority (whether legislative or judicial) by which the rule is created, or (in case it is adopted merely) is invested with the force of Law.

"Source," in the latter case, is any record or document from which the creation and purport of the rule may be more or less accurately known.

Quellen des Rechts:—

"Die Rechtswahrheiten, welche bei einem Volke gelten, sind nicht, wie wir sagen, *á priori* erkennbar, rein, allgemein, nothwendig, *in der gesunden Vernunft gegeben*, gewissermassen *angeboren*, wissenschaftlich (im strengen Sinne des Worts). Der wirkliche Zustand ist, wie wir sagen, *á posteriori*, empirisch, nach Zeit und Ort verschieden, zufällig durch eigene und fremde Erfahrung von Thatsachen zu erlernen, *geschichtlich*, (*im vollen Sinne* des Worts)." Hugo, Enc. p. 19.

Law is not knowable *á priori*, but is bottomed in principles which are obtained *historically*; i.e. by experience—one's own, or that of other people.—*Marginal Note.*

LECTURE XXX.

In a former Lecture I endeavoured to explain or indicate the respective natures and the mutual relations, of the three disparate distinctions which I will now enumerate:

1st. The distinction between written or promulged law and unwritten or unpromulged law, in those improper senses, annexed to the opposed epithets, which are styled their *juridical* senses: or, between law proceeding immediately from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker (with the authority of a sovereign or supreme).

2dly. The distinction between statute law, and judiciary (or judicial) law, or between law established by its immediate author as directly and properly exercising legislative functions, and law established by its immediate author as directly and properly exercising judicial functions.

3dly. The distinction between written law and unwritten law, in those more proper senses, annexed to the opposed epithets, which are styled their *grammatical* or literal senses.

From the natures and relations of the three distinctions which I have now enumerated, I passed to the distinction between written and unwritten law, which is made by Sir Matthew Hale and Sir William Blackstone; who apparently intend the distinction between written and unwritten law, in the *juridical* meanings of the terms; but who seem to blend and confound this last-mentioned distinction with the

utterly disparate distinction between written and unwritten law, in the *grammatical* senses of the expressions.

Having briefly recalled to your recollection these distinctions, I will now suggest the subjects of the present lecture.

Every Positive Law, obtaining in any community, is a creature of the Sovereign or State: having been established *immediately* by the *monarch* or *supreme body*, as exercising legislative or judicial functions; or having been established immediately by a *subject* individual or body, as exercising rights or powers of direct or judicial legislation, which the monarch or supreme body had expressly or tacitly conferred. Positive Law.

But though every positive law exists *as positive law* through the position or institution given to it by a sovereign government, it is supposed by a multitude of writers on general and particular jurisprudence, that there are positive laws which exist *as positive laws*, independently of a sovereign authority.

The kinds of positive law, to which this independent existence is the most frequently attributed, are the following:

1° Customary law: or, the positive law which is made by its immediate authors on customs or *mores*:—

2° The positive law which is made by its immediate authors on opinions and practices of private lawyers:—

3° The law, which, as forming a part (or as deemed to form a part) of every system or body of positive law, is styled natural or universal.

To shew the falsity of the supposition in question, through a brief examination of the natures of these three kinds of law, is the main object of the present lecture. The nature of *customary* law, of law formed *on opinions of private lawyers*, and of *natural* law (as a kind of positive law), are therefore its principal *subjects*: And to these subjects I will

now address myself in the order in which I have announced them.

Customary Law.

Independently of the position or establishment which it may receive from the sovereign, the rule which a Custom implies (or in the observance of which a custom consists) derives the whole of its obligatory force from those concurring sentiments which are styled public opinion. Independently of the position or establishment which it may receive from the sovereign, it is merely a rule morally sanctioned, or a rule of positive (or actual) morality. It is, properly, *jus moribus constitutum*. It properly obtains as a rule through the *consensus utentium*; its only *source* or its only *authors*, are those who observe it spontaneously, or without compulsion by the state.

Now a merely *moral*, or merely customary rule, may take the quality of a *legal* rule through direct or judicial legislation.

On the first of these suppositions, the legal rule, which is derived from the customary, is Statute Law: and it is styled statute, and not customary law, although it is made, by its immediate author, on a pre-existing custom. For since he utters it, openly and professedly, as and for a positive law, no one confounds the source of *the positive law* itself with the source of *the customary rule* on which it is shaped by the legislator.

On the second of these suppositions, the legal rule which is derived from the customary, is a rule of *judiciary* law. But though, as a rule of judiciary law, it is not less positive law than it would be if it were a statute, it often is deemed law emanating from custom, or *jus moribus constitutum*. For since the judicial legislator is properly acting judicially, and therefore abstains naturally from the shew of legislation, he apparently *applies* a *pre-existing rule*, instead of making and applying a new rule. And as the pre-existing rule which he appears to apply is apparently the *customary* rule on which he shapes the *positive*, the source of that

customary rule, and the source of the positive law which he virtually establishes, are not unfrequently confounded.

Customary law (as a kind of positive law) is therefore judiciary law shaped upon customs. As *merely* customary law, or as *merely* positive morality, it comes immediately from the subject members of the community by whom it was observed spontaneously or without compulsion by the State: but, *as positive law*, it comes immediately from the sovereign or subordinate judges who transmute the moral and imperfect, into legal and perfect rules.

Generation of *customary law*, per Cicero.

And this very same account of the generation of customary law, is rendered by Cicero, with more of precision than is commonly met with in his writings. If we reject the talk about *nature*, and allow for his habit or trick of sacrificing precision to euphony, we shall find, in the following passage, a correct statement of the origin of customary law. "Justitiæ initium est a naturâ profectum. Deinde quædam *in consuetudinem* ex utilitatis ratione venerunt. Postea res, et a naturâ profectas; et a consuetudine probatas, *legum metus* et religio sanxit."

Hypothesis of Blackstone, etc., about Customary Law.

But though this account of the matter is palpably true, it is commonly supposed by writers on jurisprudence (Roman, English, German, and others) that law shaped upon customs obtains as positive law, independently of the sanction adjected to the customs by the State. It is supposed for example by Hale and Blackstone (and by other writers on English jurisprudence) that all the judiciary law administered by the Common Law Courts (excepting the judiciary law which they have made upon statutes) is *customary* law: and that since this customary law exists as positive law by force of immemorial usage, the decisions of those Courts have not created, but have merely expounded or declared it.

The following are a few specimens of the numerous falsities and inconsistencies with which this hypothesis is pregnant.

All the customs immemorially current in the nation are not legally binding. But *all* these customs *would be* legally binding, *if* the positive laws, which have been made upon some of them, obtained as positive laws by force of immemorial usage.

Positive law made upon custom is often abolished by Parliament or by judicial decisions. But supposing it existed as positive law by virtue of the *consensus utentium*, it could not be abolished, conformably to that supposition, without the consent and authority of these its imaginary founders.

According to the hypothesis in question, customary laws are not positive laws until their existence *as such* is *declared* to the people by decisions of the Common Law Courts. But if they existed as positive laws, *because* the people had observed them as merely customary rules, such decisions would not be necessary preliminaries to their existence in the former character; since the people would know their existence as positive laws, without the testimony of the judges.

If all our customary laws have obtained from time immemorial, all of them may have obtained from the very beginning of the community. But many of the subjects about which these laws are conversant, (as, for example, bills of exchange,) had no existence till times comparatively recent. The imaginary authors, therefore, of these immemorial laws, legislated with a spirit of prophecy, and on matters which could not have concerned them.

There is much of the judiciary law, administered by the Common Law Courts, which has not been formed upon immemorial custom, or upon any custom: much of it having been made in recent times, on customs of recent origin; and much of it having been derived by its authors, the Judges, from their own conceptions of public policy or expediency.

Finally, the hypothesis seems to be restricted to the rules of judiciary law which are administered by the Common

Law Courts; though if all the judiciary law administered by *them*, must, as judiciary law, be deemed customary law, the hypothesis ought to be extended to all the judiciary law administered by the other tribunals.

The prevalent notion about nature of Customary Law suggested to moderns by passage in Pandects.

The notion that customary law obtains as positive law by virtue of the *consensus utentium*, was manifestly derived, by modern writers on jurisprudence, from a passage in Justinian's Pandects. The effect of the passage in question may be stated thus:

"A custom long observed by the Roman People, is equivalent to a *lex* or statute which the people formally establish. For the *written* statute is legally binding, because the Sovereign People, *by certain formalities*, manifest their pleasure that it shall legally bind.

"And the *un*written custom is also a positive law, inasmuch as the people, *by their observance of it*, manifest their pleasure that it *shall* be a positive law."

The passage itself runs in the following manner:

"Inveterata consuetudo pro lege non immerito custoditur: Et hoc est jus, quod dicitur *moribus constitutum*. Nam quum ipsæ leges nullâ aliâ ex causâ nos teneant, quam quod judicio populi receptæ sunt, merito et ea, quæ sine ullo scripto populus probavit, tenebunt omnes. Nam quid interest, populus *suffragio* voluntatem suam declaret, an *rebus ipsis et factis?*"*

Now the position maintained in this passage, confounds two sets of objects which are widely and obviously different. It confounds acts of the Roman people, in its collective and sovereign capacity, with acts of its members considered severally, and as subjects of the sovereign whole. The laws which were made by the people in its collective and sovereign capacity, were broadly different from the customary rules which were observed spontaneously by its several and

* Dig. 1. 3. 32.

subject members. The former were *positive Law*. The latter had not the effect of *positive Law*, until they were adopted *as such* by the collective and sovereign people, or by those to whom it had delegated legislative or judicial powers.

Again: The position maintained in the passage, is this:—That a customary rule which the people actually observes, is equivalent to a law which the people establishes formally; since the people (*which is the sovereign*) is the immediate author of each.

Now, admitting that the position will hold, *where the people is the sovereign*, how can the position possibly apply, where the people is ruled by an oligarchy, or where it is subject to a monarch? There, laws, established formally by the sovereign one or few, are not established by the subject many. And, on the other hand, customs observed spontaneously by the subject people, are not the production of the monarch, or of the sovereign body.

During the virtual existence of the Roman *Commonwealth*, the position maintained in the passage might have been plausible. But it is strange that the author of the passage,* (who lived under Hadrian and the Antonines,) did not perceive its absurdity. He must have known that the Roman World was virtually governed by a monarch; and that laws established formally by that virtual monarch, and customs observed spontaneously by the subject Roman community, could not be referred (in any sense whatever) to one and the same source.

And here I would remark, by the bye, that the *juridical* meaning of the terms "written and *un*written Law" arose from a misconstruction, by modern Civilians, of the passage which I have read and examined. The misconstruction is scarcely credible; since customary law and statute law are expressly referred by the passage to one and the same source: namely, the sovereign Roman People. It therefore is mani-

* Julian.

fest, that the term "*jus scriptum*" is used by the author of the passage, in the grammatical or literal sense. It is applied to the *leges* passed by the Roman *populus*, because they were committed to writing, at the time of their origin, by the authority of their immediate maker. And these *leges* are *opposed*, (under the name of *jus scriptum*,) to *customary* laws; *because* the latter (in so far as they originated in the *consensus utentium*) originated *sine scripto*.

Blackstone's supplement to Julian.

The opinion maintained in this passage, concerning the source of customary law, is adopted, with much commendation, by Sir William Blackstone; who also adds to that ancient and prevalent opinion, a notion about customary law, which perhaps originated with himself. He says expressly, or says by necessary implication, "that if much of the positive law obtaining in any community be *customary* law, the people of that community is a *free* people: which means, (if it means anything,) that the sovereign government of that community is wholly or partially a *popular* government.

"*Thus*," he remarks, (after he has cited the passage,)—"*thus* did they reason, while Rome had some remains of her freedom. And, indeed, it is one of the characteristic *marks* of English *liberty*, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it was probably introduced by the *voluntary consent* of the people."

Now customary law (as positive law) is established by the sovereign. And, consequently, whether it be introduced (or not) by the *consent* of the people, depends upon the form of the government. If the people are the sovereign, or if they share the sovereignty with one or a few, customary law (like *other* law) is, of course, introduced by their *consent* (in the strict acceptation of the term): the people solely (or the people with the monarch or oligarchs) being its immediate or ultimate authors. But if the people have no share in the sovereignty, they have no part whatever in the intro-

duction of *positive law*, be it customary or other. In the *large* sense, indeed, of the term "consent," customary law (like *other* law) is truly introduced by their *consent*, although the government be a monarchy or oligarchy; since they *consent* to the existence of the government, and of the laws established by the government, because they are determined by fear, or by some other inducement, to yield the government their obedience.

And under monarchies or oligarchies, as well as under governments purely or partially popular, much or most of the law which obtains in the community is (commonly) *customary* law. So that if customary law be a *mark of freedom*, (or show that the government of the community is purely or partially popular,) monarchies and oligarchies are commonly democracies, or commonly partake of the democratical form. I would therefore submit, that we cannot argue that the people are free *because* their law is customary. Though if we know *aliunde* that the people are free, we may conclude that their law, whether customary or not, was introduced by their consent.

Sir William Blackstone's meaning may have been this:— That the *antecedent customs*, which are the *groundwork* of customary law, are necessarily introduced by the consent of the people: Or, in other words, are necessarily consonant to their interests or wishes.

But even this is false.

If the people be enlightened and strong, custom, like law, will commonly be consonant to their interests and wishes.

If they be ignorant and weak, custom, as well as law, will commonly be against them.

During the Middle Ages, the body of the people, throughout Europe, were in the serf or slavish condition. And this slavish condition of the body of the people, originated in *custom*: Although the imperfect rights which custom gave to their masters, together with the imperfect obligations which custom imposed on themselves, were afterwards en-

forced by Law of which that custom was the basis. In various parts of Europe, the people have gradually escaped from the servile condition through successive acts of the legislature. So that the body of the people, in many of the European nations, have been released, *by direct legislation*, from the servile and abject thraldom in which they had been held by *custom*, and by law framed upon custom.

In Rome, the absolute dominion of the *paterfamilias* over his wife and descendants, arose from custom and consequent customary law, and was gradually abridged by direct legislation: namely, by the edicts of the Prætors, the laws of the People, and the edictal constitutions of the Emperors.

Let us turn our eyes in what direction we may, we shall find that there is no connection between customary law, and the well-being of the many.

In spite, then, of the grandiloquous talk by which it has been extolled and obscured, customary law has nothing of the magnificent or mysterious about it. It is but a *species* of *judiciary* law, or of law introduced by sovereign or subordinate judges as properly exercising their judicial functions. And it differs from other species of the same kind of law merely by this peculiarity: that it is formed or fashioned by the judges, who are its sources or immediate authors, upon pre-existing rules observed spontaneously, or wholly deriving their imperfect obligatory force from the religious or moral sanctions.

The motives which determine its authors to adopt these rules as law, are numberless.

But (generally speaking) the mere pre-existence of the customs upon which the law is moulded, is *amongst* those motives, if not the only one. For, if the habits and expectations of the community, or of the influential classes of the community, have been accommodated to a given custom, *that* is a strong reason for erecting the custom into Law, provided that the adjection of the legal sanction would give to the custom additional efficacy or force.

From whence it follows that *Custom* (or rather the pleasure of those, in whose observance or practice custom consists) is amongst the most frequent of the *causes* of Law, although it is not a *source* or *fountain* of law (taking those terms in their strict signification).*

Customary laws; notorious, and needing proof.

The laws or rules styled *customary*, may be divided into two classes:—Those which are enforced by the tribunals, without proof of their existence; and those which must be proved, before the tribunals will enforce them.

Laws or rules of the former class, are styled *notorious*. Or it is said that the tribunals take *judicial* notice of them; or that the tribunals are conscious *judicially* of their existence.

The division which I have now stated, must not be confounded with the division of laws into general and particular. *General* Laws or Rules (or as they are sometimes styled *Common* Laws or Rules) obtain throughout the territory of the given independent society. *Particular* Laws or Rules obtain in districts or places, which are portions of that territory.

This division and the former division, are disparate or cross divisions.

For, first; Many *particular* laws (or many of the laws which are restricted to districts or places) are not customary, but statute laws. And (secondly) many laws which are at once particular and customary, are noticed judicially by the tribunals. Such, for instance, are the particular laws, styled the custom of gavelkind, which are restricted to a certain region of our own country.

Civil and Canon Laws, as *recepta*, ranked by Blackstone with *particular* customs.

It is remarkable that the Civil and Canon Laws (as obtaining in England) are ranked by Blackstone and Hale with *particular* customary laws. Inasmuch as they are not restricted to districts

* See page 216.

or places, but obtain as Law throughout the kingdom, it is clear that they are general, and not particular (taking the terms in the meaning which I have just stated). If they are particular, because they are only applicable to particular matters or subjects (as marriage, testaments, and so on), it follows that every law is a particular law. For no one law regards *all* the subjects about which the aggregate of Laws is conversant. If they are particular, because they are enforced by particular or peculiar Courts, so is Equity particular, and so are certain of the Rules enforced by the general Courts of Common Law. Each of these Courts has rules peculiar to itself: the practice of the Exchequer, and of the Common Pleas, varying from one another, and from the practice of the King's Bench.

The truth is, that the Canon and Civil Laws (as obtaining in England) are what would be styled by the Roman Jurists "*singular*:" that is to say, not singular, as applying exclusively to peculiar subjects, or as obtaining in districts or places, but as not harmonizing or being homogeneous with the great bulk of the system.

This want of harmony or consistency with the great bulk of the system, the Roman Lawyers denote by a very odd expression: "*inelegantia juris.*"* Now the Canon and Civil Laws (as they obtain in England) may be *singular* or *inelegant*, but they are not less portions of the general law of the land than Common Law or Equity.

The division of laws into general and particular, I shall consider in a future Lecture. With reference to my present purpose, a *particular* customary law is not distinguishable from a *general*, provided it belong to that class of customary laws of which the tribunals are judicially conscious or informed, and which they will enforce without proof of

* "Sed et in hac specie divus Vespasianus, inelegantiâ juris motus, restituit juris gentium regulam," etc.

"Sed postea divus Hadrianus iniquitate rei et inelegantiâ juris motus, restituit," etc.—*Gaius*, lib. i. § 86.

their existence. Those *particular* customary laws of which the tribunals are not judicially informed, I shall consider afterwards. For to them; many of the remarks immediately following will not apply.

Jus prudentibus compositum. Law supposed to arise from the unauthorized opinions of private Lawyers.

From Customary Law, I pass to positive law which is made by its immediate authors on opinions and practices of private lawyers. Law of this kind is named by the Roman Lawyers *jus prudentibus compositum;* law constructed by private jurisconsults respected for their knowledge and judgment.

The remarks which I have applied to the law styled *customary,* will apply (with a few variations) to that imaginary law, which is supposed to emanate from the *Auctoritas prudentum,* or from the opinions of private lawyers eminent for their knowledge and ability.

By the Roman Lawyers, these merely private though respected jurisconsults are styled *conditores* or founders of law. And by modern Civilians generally, and apparently by the Roman Lawyers, they are deemed the sources of the law, or the immediate authors of the law, which really was formed upon their opinions by legislators or judges. Positive Law of the kind in question, as well as the positive law formed upon custom, has therefore been thought to obtain as positive law, independently of sovereign authority.

But merely private jurisconsults, respected for their knowledge and judgment, are not *conditores* or founders of Law, although the weight of their opinions may determine *others* to found it. If their opinions determine the legislator, the influence of those opinions is a *remote* cause of the Law, of which the Legislator himself is exclusively the *immediate* cause, or is exclusively the *source.* But any inducement whatever, leading the legislator to establish the Law, were just as much a *remote* cause of its establishment as the opinions by which he is guided. Justinian legislated by the advice

of Tribonian. He also legislated at the instance of his Empress. And the blandishments of the wife, as well as the responses of the legal oracle were *remote causes* of laws emanating from the Emperor as their *source*.

Nay, the writings of private lawyers are not law, although it be declared by the legislator that they shall thereafter be law. For they are not law, as being the production of the writers, but by virtue of the Legislator's adoption. Such, for example, is the case with those excerpts from the writings of jurists, of which Justinian's Digest is almost exclusively composed. *As* forming parts of those writings, they were not law; but as compiled and promulged by Justinian, they took the quality of law immediately proceeding from the sovereign.

"Quicquid *ibi* scriptum, hoc nostrum, et ex nostrâ voluntate compositum."—Such is the language of Justinian himself when speaking of the excerpts in the act confirming the compilation.

If a judicial decision, introducing a new rule, be suggested by the opinion of a private lawyer, his opinion is a *remote cause*, but is not the *source* of the rule which the decision introduces. The *source* or *immediate author* of the new rule of law, is that Sovereign, or that subordinate judge, whose decision is determined by the authority of the legal sage.

Under the Commonwealth, the opinions of a Roman Jurisconsult derived the whole of their weight from the estimation in which he was held on account of his knowledge and judgment. His opinions naturally influenced the decisions of the tribunals, but the tribunals were not obliged to follow them.

But, according to an obscure story told in the Digests, the tribunals were instructed (under Augustus,) to take the Law, in doubtful cases, from certain jurisconsults who were appointed by the Legislature to expound it. Now, if this story be true, *these* jurisconsults ("quibus permissum erat

jura condere") were, in truth, judges of Law. They formed an extraordinary tribunal to which the ordinary judges were bound to defer.

And, on that supposition, their responses were judicial decisions, and not the opinions of merely private jurisconsults.

The story, however, is beset with inexplicable difficulties.

It is most probable, that the responses and writings of jurisconsults were never *sources* of Law: Although they acquired the influence which the opinions of the instructed and expert will naturally obtain.

If an ignorant and incompetent judge be swayed by the opinions of a learned and able advocate, the law, which his decisions might introduce, are *his* law. It would flow from *him*, as from its *source* or immediate author, although the knowledge, enabling him to decide, would be poured into his mind by the learned advocate who predominated over him from the bar of his own tribunal.

The law introduced by judges on the authority of private jurisconsults, and the law which they make and mould upon pre-existing custom, are merely species of the same kind. Both are judiciary law, or law introduced obliquely; and the only difference between them lies in their causes; The opinions and authority of jurisconsults being a cause of the one, as pre-existing custom is a cause of the other. In the Roman Law, the two species are distinguished by distinct names. The one is styled "*jus moribus constitutum;*" the other is styled "*jus compositum á prudentibus,*" or *jus civile* (in the narrowest acceptation of the term).

In the language of our own law, the two species (though distinct) are not distinguished by distinct names. For all judicial decisions which serve as precedents, are considered as *evidence* of Law *established* by *Custom*. And, by consesequence, all judiciary law (though its *causes* are various) is named after the *source* from which it is feigned to emanate. All of it is styled *customary* law.

In neither system, does statute law, or law established directly, take various names in respect of its various *causes*. Whether it be made upon pre-existing custom, or whether (as often happens) it be made (in effect) by lawyers, it is considered as emanating from the legislator who is its immediate author, and is named accordingly. For, here, the *source* is more obvious than where the law is judiciary; and the confusion of the *sources* with the remote *causes* of law, is consequently avoided.

The *jus à prudentibus compositum* (though not marked, with us, by a distinct name) is not a stranger to our own law.

For example; much of the law in my Lord Coke's writings, consists (in the language of Hale) "of illations made by the writer upon existing law:" much of it, of positions and conclusions founded upon the writer's notions of general Utility. For (as he says himself over and over again) "*argumentum ab inconvenienti* plurimum valet in lege." And, undoubtedly, many of these illations and conclusions of this most illustrious of our *prudentes*, have served as the basis of judicial decisions, and have thus been incorporated with English judiciary law.

The only difference (in this respect) between our own and the Roman Law, lies in the different turns given to the expression.

With the Romans, judiciary law, bottomed in such illations and conclusions, would at once be referred to its remote cause. It would be styled *jus à prudentibus compositum*.

With us, the authority of the *prudentes* is affectedly sunk; and the judicial decisions, really framed upon their opinions, are considered *declarations* of Law *established* by immemorial custom.

Again: Much of the law of real property is notoriously taken from opinions and practices, which have grown up, and are daily growing up, amongst conveyancers. And, I

may observe, that the body of eminent conveyancers for the time being, is a partial picture (in little) of that body of eminent jurisconsults who (at any given period) were the *prudentes* in ancient Rome. Neither the eminent conveyancers, nor the *prudentes*, can be considered as *sources* or authors of Law. But the opinions of both, as determining the decisions of the tribunals, may be considered as *causes* of that law, which (in spite of the puerile fiction about immemorial usage) is notoriously introduced by judges acting in their judicial capacity.

With regard to the responses of the jurisconsults, to whose opinions the tribunals were bound to defer, I remarked (in a former lecture), that the responses of these jurisconsults, when given in answer to the inquiries of the tribunals, were properly judicial decisions:—judicial decisions of extraordinary judges, who were appointed by the sovereign to determine questions of Law, when the ordinary judges should find themselves at a fault.

Consequently, the authors of these responses were properly *juris conditores*. "Nam *eis* hoc majestas imperialis permisit."

Whether such extraordinary referees were ever really appointed, is one of the most difficult questions which the history of the Roman Law presents.

Strictly speaking, customs, or writings and opinions of lawyers are Law in so far as they have been recognized by judicial decisions, and no further. As we have already shewn, there can be no law without a judicial Sanction, and until a custom has been adopted as Law by Courts of Justice, it is always uncertain whether it will be sustained by that sanction or not.

Where, however, the positions of a legal writer have been in part adopted, the rest of his doctrines are ordinarily considered as Law, in so far as they are related by consequence or analogy to that, which has been actually recognized. In consequence of this relation, it is probable that it *will be*

recognized should a question ever arise, and it is therefore acted upon with almost as much assurance as if it had actually received the judicial approbation. Strictly speaking, it is not Law, but it probably *will* be Law, should the acts which are done in pursuance or in contravention of it, be ever brought in question before a Court of Justice.

And it must be observed, that the probability of its receiving such adoption increases with the number of acts which have been done in pursuance of it. A natural reluctance on the part of the Courts to defeat the expectations which its being regarded as Law have begotten, determines the tribunal to adopt it almost independently of its connexion in the way of consequence or analogy with already existing doctrines. The authority of lawyers, numerous and experienced, has here great weight.

Extension of "source" to every "remote cause" of Law.

The "jus quod natura inter omnes homines *constituit*," the "jus moribus *constitutum*," and the "jus à prudentibus *conditum* sive *compositum*," are manifestly in the same predicament. Each derives its distinctive name from its remote cause or one of its remote causes. And deriving its distinctive name from a cause *leading* to its establishment, it is supposed to *emanate* from that cause *as from its fountain or source*, and to exist as Law (strictly so called), independently of the position or institution which it receives from the sovereign or state.

The grossness of this confusion of ideas may be shewn briefly and clearly by a familiar example. In common talk, though not in technical language, an Act of our own Parliament is sometimes named after the person who proposed it or introduced it as a bill. Now since it derives its name

from the Lord or Commoner who introduced it, and since its introduction by him was amongst the causes leading to its enactment, it follows (by analogy) that he, and not Parliament, was its source or author. Grenville or Eldon was clearly the *conditor* or founder of Grenville's or Eldon's Act. For is it not *called* Grenville's or Eldon's Act, and did not the introduction of the bill by Grenville or Eldon precede the act of the Legislature?

Supposition that the sovereign merely *declares* pre-existing law.

According, then, to the suppositions which I have now examined, Customary Law, and law formed on the opinions of private lawyers, obtain *as positive law* independently of sovereign authority.

By certain writers on general jurisprudence, a similar supposition has been made in respect to *all* law. The law, (say they,) which obtains in any community is not arbitrary or capricious. It is caused by the circumstances in which the society is placed; or the sovereign is determined to make it, and to make it what it is, by those very circumstances. The sovereign, therefore, is not the *author* of Law, but merely *describes* or *defines* Law already made to his hand.

From whence it follows;

That *a law*, and the *reason* which determines its author to make it, are one and the same thing: And that if any private man conceive and describe a law, which hits the circumstances in which the society is placed, that project of his is parcel of the law of the land, and *he* a legislator and monarch.

The origin of this absurd speculation is obvious. Much of the positive law obtaining in any community is Custom turned into Law by the adjection of the legal sanction. Now, in this case, it may be said, in a certain sense, that the sovereign describes or defines law pre-existing; especially if the custom, as adopted by the sovereign, take the shape of a statute. Though it is manifest that if the sove-

reign merely described the custom, that description would not make it Law. The description, completion, and correction of positive morality, *are* as much an end for which political government is wanted, as the obtaining, by its establishment, a more cogent sanction.

But the Sovereign makes it law, not by the mere description, but by the sanction with which he clothes it.

LECTURE XXXI.

Ulpian's *Jus Naturale.*

FROM the *jus gentium* of the older Roman Law, and from the *jus gentium* or *naturale* of the Classical Jurists, I shall advert to a *jus naturale* (a *mirum jus naturale!*) which I take the liberty of styling "Ulpian's Law of Nature."

In two or three excerpts from Ulpian which are given in the beginning of the Pandects, and one of which also occurs at the beginning of Justinian's Institutes, he opposes to that *jus gentium* which tallies with the *law natural* of the moderns, a certain *jus naturale* common to man and beast: —"Jus quod natura *omnia* animalia docuit."

This last-mentioned *jus naturale* (which, as I shall shew hereafter, accords with an admired conceit of Hooker and Montesquieu) seems to have been taken by the good Ulpian from certain inept speculations of certain Stoic philosophers. Since it is peculiar to Ulpian, and since no attempt to apply it occurs in the Pandects or Institutes, it can scarcely be considered the *natural Law of the Romans,** nor can it be fairly imputed to the body of the Classical Jurists: who

* (*Vivâ voce.*) Ulpian's *jus naturale* was the one to which I referred, when I said, in a former Lecture, that the *jus naturale* of the *Romans* is a more extensive expression than the Law Natural of the Moderns.

This oversight I beg leave to correct.

The *jus gentium* of the older Roman Law has no connection whatever (as I shall shew immediately) with any system or notion of Law Natural. The *jus gentium* or *naturale* current with the Classical Jurists, tallies exactly with the Law Natural of the Moderns. The "jus quod natura omnia animalia docuit" cannot be called the *natural law of the Romans:* It

(heaven knows) have enough to answer for, in that they adopted from the Greeks the other *jus naturale*, and were thus the remote authors of that modern Law of Nature which has so thoroughly perplexed and obscured the sciences of Jurisprudence and Ethics.

Short indication of difference between *jus gentium* occurring in Justinian's compilations and *jus gentium* of earlier Roman Lawyers.

The *jus gentium* or *jus naturale* which occurs in the Pandects and the other compilations of Justinian, is equivalent to the *natural law* of modern writers on Jurisprudence. Though it occurs in Justinian's compilations, it is not properly of Roman origin. It is rather a speculative than a practical notion; and was imported into the Roman Law, from hypotheses of Greek Philosophers, concerning the rationale of Law and Morals, by the jurists who are styled "classical:" that is to say, the long series of eminent Roman jurisconsults (beginning with Sulpicius, the friend of Cicero, and ending with Ulpian, the prætorian prefect of Alexander Severus), of excerpts from whose writings the Pandects are principally composed. But the *jus gentium* of the earlier Roman lawyers (or the Roman lawyers who preceded the Classical Jurists), is properly of Roman origin, is a purely practical notion, and is *not* equivalent to the Natural Law of modern writers on jurisprudence.

Statement of the *jus gentium* of the earlier Roman Lawyers.

Having premised these brief explanations, I proceed to the *jus gentium* of Roman origin, or of the Roman lawyers who preceded the Classical Jurists.

According to the Roman Law, a member of an independent nation, *not* in *alliance* with the Roman people, had no rights as against Romans, or as between himself and other

should rather be considered as a conceit which was peculiar to a single jurist, and which never got into the vogue due to its signal absurdity.

Hugo, Naturrecht, p. 225. Hugo, Gesch. pp. 100, 207, 326 to 328, 422, 434. Von Savigny, Gesch. des Röm. Rechts im Mittelalter, vol. i. p. 3. Baumbach, Einleitung in das Naturrecht, p. 91.

foreigners or aliens. And even a member of an independent nation, *the ally of the Roman People*, had no rights (as against Romans or foreigners), except the rights conferred on members of that nation by the provisions of the *fœdus* or alliance.

According to Roman Law, strangers had no rights.

When I say that the members of an independent nation, *not in alliance with the Roman People*, had no rights as against Romans or foreigners, I understand the proposition with limitations.

When a member of any such nation *was residing in the Roman territory*, it is probable that his person was protected from violence and insult: And, although he was incapable of acquiring by transfer or succession, or of suing upon any contract into which he had affected to enter, goods actually in his possession were probably *his* goods, as against *all* who could shew no title whatever. Unless we understand the proposition with these limitations, a *peregrinus* or alien, not a *socius* or ally of the Roman People, was obnoxious to murder and spoliation at every instant, when dwelling on Roman soil.

In short, the condition of such an alien, *when residing on the Roman territory*, probably resembled the condition of an alien *enemy*, living within the ligeance of our own King.* The latter is protected from bodily harm and spoliation, although he is generally incapable of suing in the Courts of Justice, and although it is said (in loose language) that he has *no* rights.

But, taking the proposition with the limitations which I have just suggested, the members of an independent nation, not in positive alliance with the Roman People, had no rights which the Roman Tribunals would enforce. For

* [*Vivâ voce.* If residing here with the King's permission, he is in effect an alien friend.] *Quære*, The condition of an alien *enemy* not residing here with the King's permission? Though incapable of suing, he is of course protected from bodily harm and robbery. [*Caput lupinum* of an *Utlagatus.*

although they were not *positively* enemies of the Roman People, neither were they positively its allies or friends. And, agreeably to the maxim which prevailed in every nation of antiquity, they were therefore considered by the Roman Law as not existing.

This unsocial maxim (of which there are vestiges even in Modern Europe) obtained in the Roman Law from the very foundation of the city to the age of Justinian. It is laid down broadly in an excerpt in the Pandects, "that every people, not in alliance with *us*, keep everything of *ours* which they can contrive to take; whilst *we*, in return, appropriate everything of theirs which happens to fall into our hands." "Si cum gente aliquâ neque amicitiam, neque hospitium, neque *fœdus amicitiæ causâ factum* habemus, hi *hostes* quidem non sunt. Quod autem ex *nostro* ad eos pervenit, illorum fit; et liber homo *noster* ab eis captus servus fit *eorum*. Idemque est, si ab *illis* ad *nos* aliquid perveniat."

It may therefore be affirmed generally, that, according to the Roman Law (and according to the law of every nation of antiquity), the members of a foreign and independent community had no Rights: Rights which they might have acquired by virtue of any positive alliance, being created specially by the provisions of the particular treaty, and by way of exception from the exclusive and general maxim.

Condition of aliens, members of conquered nations.

From pure *peregrini* or aliens (or from members of *foreign* and *independent* nations), I turn to the members of the communities which formerly had been independent, but which had been subdued by the Roman arms, and brought into a state of subjection to the Roman Commonwealth.

The members of an independent community subdued by the Roman arms, were placed in a peculiar position. They were not admitted to the rights of Roman Citizens, nor were

they reduced to the servile condition and stripped of *all* rights. Generally speaking, they retained their ancient government and their ancient laws, so far as the continuance of those institutions consisted with a state of subjection to the Roman Commonwealth.

It is clearly laid down in the Digests, that, unless the sovereign legislature has specifically directed the contrary, the judge shall consult, in the first instance, the law peculiar to the particular region: And that the law of Rome itself ("jus quo urbs Roma utitur") shall not be applied to the case which awaits decision, unless the law peculiar to the particular region shall afford no solution of the legal difficulty.

Difficulties arising from their position.

Such being the condition of the conquered and subject nations, the following difficulties inevitably arose.

Inasmuch as those conquered and subject nations were not incorporated with the conquering and sovereign community, their members had no rights as against Roman Citizens, according to the ancient and strict law obtaining in Rome itself. For, during the period in which that law arose, those conquered and subject nations were foreign and independent societies; and agreeably to the unsocial maxim which I have already explained, their members had no rights which the Roman tribunals would enforce.

And, agreeably to the same maxim, members of one of those nations had no rights as against members of another. For, although those nations were now subject to their common sovereign, Rome, they had been foreign and independent nations, *with reference to one another*, as well as with reference to the dominant nation which had beaten and subdued them all. In consequence, therefore, of the maxim to which I have alluded, the law peculiar to any of those subject nations imparted no rights to the members of another community.

Consequently, whenever a controversy arose between a

Roman and a Provincial, or between a provincial of one and a provincial of another Province, there was no law applicable to the case, and the party who had suffered the damage was left without redress. As between Romans and provincials, or as between provincials of one and provincials of another Province, the Roman Law afforded no remedy. For the Roman Law acknowledged no rights in any but Roman Citizens.

In either of the same cases, the particular law of any particular Province was equally inefficacious. For the people of that Province had been an independent community; whose law (like that of Rome) acknowledged no rights in any but its own members.

Creation of *Prætor Peregrinus*, to administer justice *in Italy*, between Romans and members of *Italian States*, and between members of any of those States and members of any other.

To meet such cases, there was a manifest necessity for a system of rules which should embrace all the nations composing the Roman Empire: which should serve as a *supplement* or *subsidium* to the Law of Rome itself, and to each of the various systems of provincial law obtaining in the conquered territory.

The obvious and urgent want was supplied in the following manner.

In the earlier ages of Rome, and before she had extended her empire beyond the bounds of Italy, the inconvenience which I have tried to explain inevitably arose, in consequence of the unsocial character of the old Roman Law, and of the equally exclusive character of the various systems of law obtaining in the Italian States which the Roman People had subdued. Accordingly, in addition to the ancient Prætor (who judged in civil questions between Roman Citizens, and agreeably to the law peculiar to the *Urbs Roma*), a Prætor was appointed to determine the civil cases which arose from the relations between the victorious republic and the subject or dependent communities.

This new Magistrate (who resided in Rome itself, but

who seems to have made periodical circuits through the conquered States of Italy) exercised civil jurisdiction in the following cases: namely, in all questions or controversies between *Roman citizens* and *citizens of the Italian communities which were subjects or dependents of Rome;* and in all questions or controversies between citizens of *any* of those communities and citizens of *any other.*

This new magistrate was styled "*Prætor Peregrinus:*" Not because his jurisdiction was *restricted* to questions *between foreigners;* but because the questions, over which his jurisdiction extended, arose *more frequently* between foreigners and foreigners than between foreigners and Roman Citizens: "Quod *plerumque* inter peregrinos jus dicebat."

In the strict sense of the term *Peregrinus,* the parties, whose causes he commonly determined, were not *peregrini,* or foreigners, but friends and vassals of Rome. But since they *had been* foreigners before their subjection to Rome, and had not been admitted afterwards to the rights of Romans, they were still entitled *peregrini* or foreigners (as distinguished from *Cives* or Roman Citizens).

As I have remarked already, it is not probable that a foreigner (in the strict acceptation of the term) could regularly maintain a civil action before any of the Roman Tribunals.

After the appointment of the *Prætor Peregrinus,* the ancient and ordinary Prætor was styled (by way of distinction) Prætor *Urbanus:* Partly because his tribunal was immovably fixed at Rome, and partly because he decided between Romans and Romans, agreeably to the peculiar law of their own pre-eminent City.

Law administered by Prætor Peregrinus.

From the appointment of the *Prætor Peregrinus,* and the causes which led to the creation of his new and extraordinary office I proceed to the law which he administered.

In questions between foreigners and Romans, and between foreigners of different dependent States, the *first* Prætor Peregrinus must have begun with judging arbitrarily. For neither the law of Rome herself, nor the law obtaining in any of the vassal nations, afforded a body of rules by which such questions could be solved.

But a body of subsidiary law, applicable to such questions, was gradually established by the successive *Edicts* which he and his successors (imitating the *Prætores Urbani*) emitted on their accession to office. This subsidiary law, thus established by the Foreign Prætors, was probably framed, in part, upon general considerations of general utility. But, in the main, it seems to have been an *abstractum* (gathered by comparison and induction) from the peculiar Law of Rome herself, and the various peculiar systems of the subject or dependent nations.

Perpetually engaged in judging between foreigners and citizens of Rome, *and* between foreigners of *different* dependent States, these magistrates were led to compare the several systems of law which obtained in the several communities composing the Roman *Empire*. And, comparing the several systems obtaining in those several communities, they naturally extracted from those several systems, a system of a liberal character; free from the narrow peculiarities of each particular system, and meeting the common necessities of the entire Roman World.

Extension of the *jus gentium* created by the *Prætores peregrini* to the outlying provinces.

After the dominion of Rome had extended beyond Italy, the *subsidiary* Law introduced into *Italy* by the edicts of the *Prætores peregrini*, was adopted and improved by the Edicts of the various Roman Governors, who (under the various names of Proconsuls, Prætors, Proprætors, or Presidents) represented the Roman People *in the outlying Provinces*.

For the governors of these outlying provinces (like the Prætor Peregrinus, whose jurisdiction was confined to Italy, and like the proper magistrates of the Roman People) were

tacitly or expressly authorized to legislate, as well as to judge; "jus *e*dicere" as well as "jus *di*cere."

As between Provincials of his own province, the governor of an outlying province regularly administered the law which had obtained in the province before its subjection to Rome. As between Romans and Romans residing within his province, he regularly administered the law peculiar to Rome herself. But neither the peculiar law of his own province, nor the peculiar law of Rome (in its old and unsocial form), would apply to civil cases between Romans and Provincials or between Provincials of different provinces.

In questions therefore, between Roman Citizens and Provincials, or between Provincials residing in his province (*but belonging to different provinces*), he administered the subsidiary law created by the *Prætores Peregrini*, or a similar subsidiary law created by himself or his predecessors.

Resumed statement of the subsidiary Law obtaining in Roman Empire.

Consequently, *before* and *after* the dominion of Rome had extended beyond Italy, a law was administered in Italy (by the *Prætores Peregrini*) in aid of the law peculiar to Rome herself, or to any of the Italian communities which Rome had subdued. *After* the dominion of Rome had extended beyond Italy, the same or a similar law was administered in the outlying provinces (by their respective Presidents or Governors), in aid of the law peculiar to Rome herself, or of the law obtaining in any of those provinces before its subjection to the conquering City. And this subsidiary law, thus administered in Italy and in the outlying provinces, was applied to civil questions between citizens of Rome and members of the nations subject to Rome, or between members of any of those nations and members of any other.

Uniformity of this subsidiary law throughout the Roman Empire.

Since the want which led to the creation of this subsidiary law was the same in Italy and the outlying Provinces, and since all its immediate authors were representatives of the same sove-

reign, it naturally was nearly uniform throughout the Roman World, notwithstanding the multiplicity of its sources. The Presidents of the outlying provinces naturally borrowed from the Edicts of *Prætores Peregrini;* and the *Prætores Peregrini* as naturally adopted the improvements which the Edicts of those Presidents introduced.

As distinguished from the system of law which was *peculiar* to Rome herself, and also from the systems of law which were respectively *peculiar* to the subject or dependent communities, this subsidiary law was styled *jus gentium,* or *jus omnium gentium:* the law of *all* the nations (including the conquering and sovereign nation) which composed the Roman World. As being the law *common* to these various nations, or administered *equally* or *universally* to members of these various nations, it was also styled *jus æquum, jus æquabile, æquitas:* Though the term "*æquitas*" seems to have denoted properly, not this common or equal law, but *conformity or consonance to* this common or equal law; as the more extensive but analogous term *justitia* signifies conformity or consonance to any *jus* or *law* of any kind or sort. And the *jus gentium* which I have now attempted to describe, was the only *jus gentium* that was known to the Roman Law, till the *jus gentium* or *naturale,* which occurs in Justinian's compilations, was imported into it, by the jurists who are styled Classical, from speculations of Greek Philosophers on Law and Morals.

This subsidiary law was styled *jus gentium, jus æquum,* etc.; and was the *jus gentium* of the earlier Roman Lawyers.

Originally, the *jus gentium* which I have attempted to describe, was not parcel of the *proper* Roman Law, or the law *peculiar* to Rome herself.

But the first arose in an age comparatively enlightened, and was a product of large experience; whilst the last had arisen in an age comparatively barbarous, and was a product of narrow experience. The *jus gentium,* therefore, was so conspicuously *better* than the proper Roman Law that naturally it gradually passed into the latter; or became incorporated with the latter.

It influenced the legislation of the *Populus, Plebs,* and Senate; it influenced the opinions held and emitted by the *Prudentes;* and (above all) it served as a pattern to the *Prætores Urbani,* in the large and frequent innovations which they made by their general edicts, upon the old, rude, and incommodious law peculiar to the *Urbs Roma.*

So much indeed, of the *jus gentium* passed into the *jus prætorium* (or the law which the *Prætores Urbani* created by their general edicts,) that one of the names given to the latter was probably transferred to it from the former. It probably was named *æquitas,* (or *jus æquum,*) after that *æqual* or *common* law, from which it had borrowed the bulk or a large portion of its provisions.

Æquitas, the term.

The law formed by the Edicts of the *Prætores Urbani* (or the Prætors who sat immovably in the *Urbs Roma,* and administered justice between Roman citizens) was commonly called *jus prætorium.* But having borrowed largely from the *jus gentium,* it was also styled, like the *jus gentium,* "*æquitas:*" A name which was extended to it the rather, for this reason:—that *æquitas* had become synonymous with *general utility;* and that the *jus prætorium* (when contrasted with the old law to which it was a corrective and supplement) was distinguished by a spirit of impartiality or fairness, or by its regard for the interests of the weak as well as for the interests of the strong: *e.g.,* It enlarged the rights of women; gave to the *filius familias* rights against the father; to the members of the subject States, rights against Roman citizens.

Jus Civile as opposed to *Jus Gentium* of Roman origin. Near equivalence of that distinction to "*jus civile et jus prætorium.*"

Now after the incorporation of the *jus gentium* with the proper Law of the *Urbs Roma,* the latter was distinguishable, and was often distinguished, into two portions; namely the *jus gentium* which had been incorporated with it, and that remnant of the older law which the *jus gentium* had not superseded. As being proper or peculiar to the City of Rome, this remnant of the older law (when con-

tradistinguished from the *jus gentium*) was styled *jus civile:* that is to say, the proper or peculiar Law of that *Civitas* or Independent State. Though (as I shall shew hereafter) *jus civile* (taken in a larger meaning) included the *whole* of the Roman Law: the *jus gentium* which it had borrowed, as well as the *jus civile* (taking the expression in the narrower meaning) upon which the *jus gentium* had been superinduced.

This distinction between *jus civile et gentium* (as denoting different portions of the more recent Roman Law) nearly tallied with the distinction between *jus civile et prætorium.* For first; Though much of the *jus Prætorium* (or the law introduced by the edicts of the *Prætores Urbani*) was not suggested to its authors by the *jus gentium, most* of it was naturally formed upon the model or pattern which that æqual law presented to imitation.

Secondly; although the incorporation of the latter with the Law of the *Urbs Roma,* was partly accomplished by acts of the *Populus, Plebs,* and Senate, still it was principally effected through the edicts of the *Urbane* Prætors: By whom (as I shall shew in a future Lecture) the business of Civil Legislation was mainly carried on.

Now as most of the *jus prætorium* consisted of *jus gentium,* and as most of the *jus gentium* (imported into the Roman Law) was imported by the edicts of those Prætors, it is not wonderful or remarkable (considering the clumsy manner in which language is usually constructed) that *jus prætorium* and *jus gentium* were considered synonymous expressions:—that the distinction between *jus civile et jus gentium,* and the distinction between *jus civile et jus prætorium,* were considered as equivalent distinctions (although, in truth, they were disparate).

Æquitas. And (for the same reason) the extension of the term "*æquitas*" was restricted to the *jus prætorium;* though the term *might* have been extended to a *lex,* or a *Senatus-consultum* which had borrowed its provisions or principle from the *jus gentium.*

The *jus gentium* therefore of the earlier Roman Lawyers, was the common law of the community composing the Roman world, as contradistinguished to the particular systems which were respectively peculiar to those several communities or *gentes*.

Absorption of *jus gentium* by proper law of *Urbs Roma*.

But in consequence of this incorporation of the *jus gentium* with the law peculiar to the *Urbs Roma*, the *jus gentium*, as a separate system, eventually disappeared. For the proper Roman Law, having adopted and absorbed it, became applicable to the cases which it had been made to meet: That is to say, to civil questions between Citizens of Rome and members of the communities which Rome had subdued, or between members of any of those communities and members of any other. And, by consequence, the office of the *Prætor Peregrinus* thereafter fell into disuse; and the Edicts of the Presidents in the various provinces were thereafter exclusively occupied with purely provincial interests.

Causes of fitness of Roman Law for a *Welt-Recht*, or universal Law.

The Roman Law having absorbed the *jus gentium*, and tending in every direction to universality, had now put off much of its exclusive character. Although that older portion of it, which was marked with the distinctive name of *jus civile*, was still the peculiar law of Roman Citizens, much of the later law introduced by the people and Senate, and more of the law established by the Urbane Prætors, was adapted to the common necessities of the entire Roman world. Hence the Law of the *Urbs Roma* (though originally the peculiar law of the dominant City) was applied (*in subsidium*) to cases between Provincials, although the contending parties were members of the same province, and were actually within the jurisdiction of its peculiar tribunal. Owing to the character of universality which it thus acquired, and which was afterwards heightened by the labours of the Classical Jurists, the Roman Law (though the law of a single people living in a remote age) has obtained as auxiliary law in the nations of

Modern Europe, or has been incorporated with their own peculiar systems.

And here I would remark that a common law or *jus æquum*, nearly resembling the *jus gentium* in question, has obtained in almost every nation with which we are acquainted.* For every system which is common to a limited number of nations, or to all the members of a single nation, is a *jus gentium* (as the phrase was understood by the earlier Roman Lawyers) when opposed to the particular systems of those several communities, or to the particular bodies of law obtaining in that one community.

Wherever, in short, there coexist various systems of particular law, and a general system, there is a *jus gentium* (in the sense of the older Roman Lawyers).

The distinction of *jus civile* into *jus civile et jus gentium* which was made by the classical jurists, and

It is said in the Pandects and Institutes of Justinian, and also in the Institutes of Gaius (from which Justinian's Institutes were principally copied,) that every independent nation has a positive law and morality ("*leges et mores*"), which are

* (*E. g.*) Roman Law as subsidiary law of a limited number of modern nations. General Feudal Law (or *abstractum* contained in *Libri Feudorum*) as subsidiary law of a limited number of modern (or middle age) nations.

Jus commune Germanicum, since the dissolution of the Empire.

Law Mercantile.

Canon Law.

Jus commune Germanicum, before dissolution of Empire.

Law contained in General Prussian Code.

Common Law of United States of America, which is applied by Federal Courts in cases over which the Constitution has given them jurisdiction, in default of law made or specified by the Constitution or by Congress.

Common Law of England, as originally understood: though original idea now cut down to Law judiciary—not made on statutes—administered by Courts of Common Law, and obtaining as Law throughout the Realm.

Falck, § 124. Blackstone, vol. ii. 44; vol. iv. 67.

Du Ponceau's Jurisdiction of Federal Courts.

occurs in Justinian's compilations.

peculiar to itself, of which the given community is the source or immediate author, and which, as being peculiar to that given community or *civitas*, may be styled aptly *jus civile*: But that every nation, moreover, has a positive law and morality which it shares with every other nation; of which a natural reason is the source or immediate author; and which, as being observed by all nations, may be styled aptly "*jus gentium*," or "*jus omnium gentium*."

"Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est, vocaturque jus civile; quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur, vocaturque jus gentium; quasi quo jure omnes gentes utuntur."

And the *jus gentium* described in the foregoing passage is described in other passages in the Pandects and Institutes as the "commune omnium hominum (sive civitatum) jus:" the "antiquius jus quod cum ipso genere humano proditum est:" the "naturale jus quod vocatur jus gentium; quod divinâ quâdam providentiâ constitutum, semper firmum atque immutabile permanet."

It is manifest, moreover, from the language of these passages, that the *jus gentium* occurring in Justinian's compilations is the natural or *divinum jus* which occurs in the writings of Cicero; and which Cicero himself, as well as the Classical Jurists, who probably were influenced by his example, borrowed from the φυσικον δικαιον, or natural rule of right, conceived by Greek speculators on Law and Morals.

I remarked just now, that the *jus prætorium*, or the Law created by the general edicts of the Prætores Urbani, borrowed the bulk, or a large portion of its provisions, from the *jus gentium*, (or *jus æquum* or *commune*,) which was

properly of Roman origin. And it is not unworthy of observation, that Cicero's *jus naturale* is opposed to the *jus prætorium*, and therefore, to the *jus gentium* which was properly of Roman origin, as well as to the law which the *jus prætorium* modified, and which was strictly peculiar to the Urbs Roma.

"Non a duodecim tabulis, (says Cicero,) neque a Prætoris edicto, sed penitus, ex intimâ philosophiâ, haurienda juris disciplina."

The distinction between jus civile and jus gentium which occurs in Justinian's compilations, is speculative rather than practical.

It seems to follow from the foregoing statement, that the distinction between *jus civile* and *jus gentium*, which occurs in Justinian's compilations, is speculative rather than practical; and that the Classical Jurists introduced it into their treatises on the Roman Law, rather to display their acquaintance with the ethical philosophy of the Greeks, than because it was a fit basis for a superstructure of legal conclusions.

Accordingly, a legal inference drawn from the distinction, is scarcely to be met with in any of Justinian's compilations; though, since the distinction is placed at the beginning of the Pandects and Institutes, and is there announced to the reader with a deal of formality and pother, one might naturally think it the forerunner to a host of important consequences.

Modes of acquisition *ex jure civili*, and *ex jure gentium*.

In the Institutes, indeed, of Justinian (following the Institutes of Gaius,) titles, or modes of acquisition, are divided into *civil* and *natural*, or modes of acquisition *ex jure civili* and modes of acquisition *ex jure gentium*: the former, it is said, being a peculiar offspring of the system of positive law peculiar to the Roman *Civitas*; and the latter, it is said, being sanctioned legally in *all* political societies, and sanctioned morally or by custom in all societies whatever. But this division of modes of acquisition is not followed by a single inference. And (what is equally remarkable) the modes of acquiring dominion, and

certain other of the rights which avail against the world at large, are the only titles that the division embraces; although of the Roman modes of acquiring obligations, (or the rights which avail exclusively against persons specifically determined,) some are peculiar creatures of the Roman Law, whilst others obtain in all societies whatever by force of positive law or merely customary rules.

Crimes *juris gentium* or *mala in se.* Crimes *jure civili*, or *mala quia prohibita.*

The only legal consequence, drawn from the distinction in question, that occurs in the Roman Law, is (I believe) a difference, regarding *ignorantia juris*, which it makes between criminal injuries.

According to the Roman Law, crimes, or public wrongs, are crimes *juris gentium* or crimes *jure civili:* the former being offences against such positive laws as are laws of *Nature* or the *Deity* (though the State adopts and enforces them); and the latter being offences against such positive laws as are merely positive or civil.

* Gaius, 1, 23, 25, 85. Inst. 3. Dig. 1, 2, etc. Hugo, Gesch. 826. See Vol. I., 'Province of Jurisprudence' (Author's Preface).

† Gaius, p. 110. Inst. 23. For distinction in regard to acquisitions *per universitatem*, see Hugo, Gesch. p. 173.

LECTURE XXXII.

The distinction of positive law into natural and positive, as commonly understood by modern writers on jurisprudence. Printed Lectures, Ref. xii. p. 110, 135, 190.

FROM the *jus gentium* of the earlier Roman Lawyers I proceed to the distinction of positive law into natural and positive, as the distinction is commonly understood by modern writers on jurisprudence.

Rationale of the distinction.

The *rationale* of this distinction, may, perhaps, be conceived and expressed in the following manner.

The positive laws of any political community are divisible into two kinds:

Some it would probably observe as moral or customary rules, although it were a *natural* society (or a society *not* political), and although it were also in the savage state which commonly accompanies the absence of political government. For they rest upon grounds of utility which are strikingly obvious; and which extend, moreover, through all societies (natural or political, savage or refined). The positive laws, for example, which, in political societies shield the lives of the citizens, are admitted as moral rules, and commonly are observed as such, even by the members of the natural societies which have not ascended from the savage state.

There are others of the positive laws obtaining in a political community, which it would *not* observe as moral or customary rules, if it were a natural society, and were also in the savage condition. For some of the positive laws obtaining in a political community, suppose that the given

community is a political community; and therefore could not obtain in it if it were a natural society. Such, for example, are the positive laws which determine the powers and duties of the ministers of justice, and of the other political or public persons subordinate to the sovereign government.

Some, moreover, of the positive laws obtaining in a political community, would probably be useless to a natural society which had not ascended from the savage state. And others which might be useful even to such a society, it probably would not observe; inasmuch as the ignorance and stupidity which had prevented its submission to political government, would probably prevent it from observing every rule of conduct that had not been forced upon it by the coarsest and most imperious necessity.

The positive laws, therefore, of any political community are divisible into two kinds.

Some it would probably observe as moral or customary rules, although it were a society not political, and also had not ascended from the savage state. Others it certainly or probably would *not* so observe, if it were a natural society, and were also in the savage condition.

The positive laws, moreover, of any political community may be distinguished in the following manner:

Some are peculiar or proper to that single political community, or, at least, are not common to all political communities. Others are common to all political communities, or form a constituent part of every positive system.

But it is probable that some of the laws which obtain as positive laws in all political communities, would obtain as moral rules in any political community, although it were a natural society, and living in the savage condition. For, since there are political communities that scarcely have ascended from the savage state, it is probable that some of these laws rest upon grounds of utility which are strictly universal and also strikingly obvious: which extend through

all societies (natural or political, savage or refined), and which even a natural society, in the rudest condition of humanity, could hardly fail to perceive.

Now the positive laws which are common to all political communities, and which, moreover, are universally and palpably useful, are apparently the "natural laws" usually contemplated by modern writers on jurisprudence when they mean by the expression "natural laws" a kind of the laws that are properly the subject of their science.

The rationale of the distinction of positive laws into natural laws and positive laws, may therefore be stated thus.

The former are common to all political societies, in the character of positive laws: and being palpably useful to every society whatever, they are common to all societies, political or natural, in the character of moral rules.

The latter are not common as positive laws, to all political societies; or though they be common, as positive laws, to all political societies, they are not common, as moral rules, to all societies (political or natural).

This natural law, as positive law, is closely analogous to the *jus gentium* of the earlier Roman Lawyers, etc.

And here I would remark that the natural law in question when considered as positive law, is closely analogous to the *jus gentium* of the earlier Roman Lawyers, and to any of the systems of common or general law which resemble their *jus gentium*. For the natural law in question is the common positive law of all independent nations; and the *jus gentium* of the earlier Roman Lawyers, or any of the systems of general law which resemble their *jus gentium*, is a common positive law of a comparatively restricted extension: being common to a limited number of independent nations, or common to all the members of a single independent nation.

Natural law of moderns, and *jus gentium* of Justinian's compilations, embrace positive morality (especially in-

But it must be remarked that the natural law of modern writers on jurisprudence, (like the *jus gentium* or *naturale* which occurs in Justinian's Compilations,) is not restricted to positive laws, but comprises merely moral, or merely cus-

ternational) as well as positive law.* tomary rules. It comprises *every* rule which is common to *all* societies, though the rule may not obtain, as positive law, in all political communities, or in *any* political community. And consequently, the natural law of those modern writers, (like the *jus gentium* or *naturale* which occurs in those Compilations,) embraces all the laws (or rules of positive morality) which are styled international laws, or the laws of nations. Or, rather, it embraces all those rules of international morality, which are not observed exclusively by a limited number of nations, but obtain, or are deemed to obtain, between all nations whatsoever.

The *jus gentium*, therefore, which occurs in Justinian's Compilations, is a much larger expression than "the law of nations" as meaning international law, or the law which obtains *between* nations. International morality is only a small part of the *jus gentium* in question; since it comprises every rule (be it positive and moral, or be it *exclusively* moral) which is common to all societies (political or natural). "*Jus feciale*" or "*jus belli et pacis*," and not "*jus gentium*" or the "law of nations" is the name which is always given to international morality, by the Roman lawyers themselves.†

Argument for the distinction of positive law and morality into *natural* and *positive*: with purposelessness of it, if general utility be the only index to Law of Deity or Nature.

I have stated the modern distinction of positive laws (which includes a similar distinction of merely moral rules) into *natural* and *positive* (or natural and simply positive). But since the distinction, apparently, is utterly or nearly useless, (though it rests upon a real difference between those laws and rules,) I will now add to the foregoing statement of it, a short notice of the argument by which it commonly is maintained.

That current argument may be put in the following manner:

There are positive rules of conduct, (legal *and* moral, or

* Falck, 283, 79; Hugo, Enc. p. 279; Gaius, p. 237.

† See Notes on International Law, p. 269.

exclusively moral,) which obtain universally, or are observed by *all* societies. But, since they obtain universally, they must have been made or shaped, by their human authors, on laws of the Deity or Nature which were known to those authors through an instinct. For varying and fallible reason, as merely informed and advised by general utility or expedience, could not have determined *all* societies to the adoption and observance of the *same* body of rules. And the inference is confirmed by this further consideration; that these rules are observed concurrently by unconnected societies of men who have not ascended from the savage condition; whose intelligence is scarcely superior to that of the lower animals; and whose imbecile reason, as left to the uncertain guidance of general utility, could hardly have conducted them to a perfectly uniform result.

The human authors, therefore, of these universal rules, copied them from divine originals; which divine originals were known to those human authors, not through fallible reason led by a fallible guide, but through an instinct or sense, or through immediate consciousness.

But since their human authors copied them from divine originals, which were known to those human authors through a perfectly infallible index, they are not so properly rules of *human* position or establishment, as rules proceeding immediately from the Deity himself, or the intelligent and rational Nature which animates and directs the universe. They are properly natural rules, or rules created immediately by Nature or the Deity, although the men, who are deemed their authors, have armed them with additional sanctions, legal or moral.

But there also are positive rules, (legal and moral, or exclusively moral) which are *not* universal. And since these rules are not universal, there is no ground for inferring that they were copied from divine originals, or from divine originals as known instinctively and infallibly. They either were not copied from divine or natural originals; or they

were copied from such originals, as conjectured by the imperfect light of general utility or experience. Consequently, they certainly or probably are of purely human position: and therefore may aptly be opposed to universal and natural rules, by the epithet of positive or *merely* positive.

Though I shall not examine the argument which I have now stated, I must remark that the distinction of positive rules into natural and positive seems to rest exclusively (or nearly exclusively) on the supposition of a moral instinct; or, (as this real or imaginary endowment is named by the Roman lawyers and by various modern writers,) a natural reason, or a universal and practical reason.

The distinction, indeed, is not unmeaning, although the principle of general utility be the *only* index to the laws of Nature or the Deity. For as some of the dictates of general utility are exactly or nearly the same at all times and places, and also are so strikingly obvious that they can hardly be overlooked or misconstrued, there are positive or human rules which are absolutely or nearly universal, and the expediency of which must be seen by merely natural reason, or reason without the lights of extensive experience and observation.

Assuming, then, that general utility is the only index to the laws of the Deity, the distinction answers to a difference between positive or human rules, which certainly is not imaginary, though no one can describe it precisely. For no one (I presume) can determine exactly, what positive rules are strictly universal, and which of them are merely particular.

But if the principle of general utility be the only index to the laws of the Deity, the distinction, though not unmeaning, seems to be utterly or nearly purposeless. For every human rule (be it universal or particular) which accords with the principle of utility, must accord with the Divine Law of which that principle is the exponent. So that all positive rules, particular as well as universal, which

may be deemed beneficent, may also be deemed *natural* laws, or laws of Nature or the Deity which men have adopted and sanctioned.

Besides, rules which are peculiar to particular countries may be just as *useful* as rules which are common to all countries. The laws which determine the distribution of water in hot and arid climates, or which regard the construction and preservation of embankments in countries exposed to inundation, are not less *useful* (although they are limited to certain regions) than the laws which have gotten the specious name of *natural* because they are suggested by necessities pressing upon all mankind.

Laws imposing taxes necessary to the maintenance of political government, are not less useful than the laws which guard property or life: though the former are merely positive, (as following the existence of government,) whilst the latter obtain universally (in the character of moral rules), and therefore are deemed *natural*. Yet, so confused and perverse are the moral perceptions of the vulgar, that many an honest man, who would boggle at a theft, shall cheat the public revenue with a perfectly tranquil conscience.

A distinction of crimes into "*mala in se*" and "*mala quia prohibita*," which, though utility be the only index to the laws of the Deity, might not, perhaps, be ill founded.

If a law set by the state be pernicious or useless, may we break it without offence against the Law of God? The specific consequence of breaking the specific law, would (by the supposition) be harmless, if not positively good. But a breach of a mischievous law tends (in the way of example) to produce offences against other laws which are decidedly beneficent. To import goods which are prohibited, for the absurd and mischievous purpose of protecting domestic manufactures, is a perfectly innocent act, with reference to its specific consequences. But since the importation of these tends generally to embolden smugglers, a man of a delicate conscience would hardly import them.

Now if an offence would be mischievous on the whole, although the violated law were itself useless or pernicious,

it might be styled *malum prohibitum*, or *malum quia prohibitum*. The act would *be* malum (or an offence against the Law of God as well as the Law of Man) merely *because* the act had been prohibited by the latter, and *because* the breach of the useless or mischievous prohibition might lead to violations of beneficent obligations. If the breach of the useless or mischievous law would not be mischievous (with reference to the sum of its consequences) it would not be *malum* at all.

According to the principle of Utility, the distinction (if worth taking) would therefore stand thus: *Mala in se* are offences against useful laws: *Mala prohibita*, or *quia prohibita*, are mischievous offences against laws which are themselves useless or mischievous:

Innocuous offences against useless or mischievous laws are not *mala*: In other words, they are not pernicious; and therefore are not violations of the Law of God or Nature.

The distinction of crimes, made by the Roman law into crimes *juris gentium* and crimes *jure civili*, tallies with the distinction of crimes made by modern writers into *mala in se* and *mala prohibita*. Offences against human rules which obtain universally, are (according to these writers) *mala*, or offences, *in se*, inasmuch as they *would be* offences against the law of Nature or the Deity, although they were not offences against rules of human position. But offences against human rules which only obtain partially, are *not*, according to those writers, offences against laws of nature. Or at least, they would not be offences against laws of the Deity if they were not offences against positive law or morality. And therefore they are *mala*, or offences, *quia prohibita*, or they take their quality of offences from human prohibitions and injunctions.

I believe that no legal consequence has been built on this last distinction, by any of the systems of positive law which have obtained in modern Europe.

"Natural Law" as meaning certain rules of human position; and "Natural Law," as meaning some standard to which human rules should conform.

I will here advert for a moment to two of the disparate meanings which are annexed to the ambiguous expression "Natural Law," by writers on jurisprudence and morals.

Taken with the meaning which I have endeavoured to explain, it signifies certain rules of human position; namely the human or positive rules which are common to *all* societies, in the character of law and morality, or in the character of morality.

But taken with another meaning, it signifies the laws which are set to mankind by Nature or the Deity, or more generally, it signifies the *standard* (whether that standard be the laws of the Deity, or a standard of man's imagining) to which, in the opinion of the writer, human or positive rules *ought* to conform. And by the confusion of the meaning which I endeavoured to explain, with the meaning which I now have suggested, the grossest contradiction and nonsense is frequently engendered.

In a passage, for example, in the Pandects, it is said that the institution of slavery is a creature of the *jus naturale* or *jus gentium*: The institution being common to all the nations of antiquity, or at least to all the nations with which the Romans were acquainted.

But in another passage in the same compilation, it is said, that all men are naturally equal, and that the institution of slavery is repugnant to natural law. Now the law of nature which is the author of slavery, and the law of nature which repugns it, are not one law set by one nature, but two conflicting laws set or established by hostile natures.

In the one case, the author was speaking of that law of nature which is actually an integrant portion of all positive law. In the other, the author was probably thinking of law as it should be, and styled the standard to which it ought to conform "the Law of Nature." He either in-

tended the principle of general utility, or the will of the Gods, as indicated *naturali ratione*.

The writer of the first of those passages meant by natural law, the human rules which he deemed universal. The writer of the last, hardly intended to affirm that slavery was not a creature of the same human rules. For though the institution has not obtained in all times and places, it was deemed by the Greeks and Romans a strictly universal institution, and was common to all the countries which composed the writer's world. He meant, therefore, by "natural law" *not* the human rules which are common to all societies, but the *standard* or *measure* to which, in his own opinion, rules of human position ought to be adjusted. When he said that the institution of slavery was repugnant to natural law, he probably meant to intimate that he thought the institution pernicious, notwithstanding its universality; and he probably meant by the expression "natural law," either the dictates or suggestions of general utility, or else the law of the Deity as indicated by general utility.

"Natural Law," as meaning human rules, and "Natural Law," as meaning a Standard.

Again: The *Jus Civile* is defined by Ulpian and others, as "quod neque in totum a naturali vel gentium *recedit*, nec per omnia ei servit: Quod itaque efficimus, cum aliquid addimus vel *detrahimus* juri communi."

Now the *Jus naturale* or *gentium* (as meaning an actual portion of all positive systems) is not susceptible of *detraction* or *abolition*. It *is jus naturale* (or "jus quo omnes gentes utuntur") precisely because it is an integrant portion of all systems whatever. If abolished in any system, it would lose the universality which is essential to its existence.

Here, therefore, *Jus naturale* must mean something else.

It must mean the law set by the Deity and to which human laws *should* conform: The natural law which abhors slavery, although the natural law which is a por-

tion of all positive, be the author or creator of the institution.

Agreeably to the plan which I sketched in my last Lecture, I should next examine the *jus naturale*, which I style, for the sake of distinction, *Ulpian's* Law of Nature: A law, which, according to him, is common to man and beast; and which he contradistinguishes from that *jus gentium*, or *naturale*, which tallies with the Law Natural of modern jurists and moralists. Ulpian's Law of Nature.

But since Ulpian's Law Natural is peculiar to himself; since it only occurs in two or three passages of Justinian's Institutes and Pandects, and has no influence upon the *matter*, or even upon the *form*, of the Roman Law, I shall not occupy your time with it, but shall proceed in my next Lecture to *Equity*: A subject which is closely related to the *jus gentium*, and which I am unwilling to sever from that closely related topic by an impertinent and intrusive comment upon an insulated absurdity.

Did it not stand at the *beginning* of the Institutes and Pandects, and were it not the source of certain conceits which have gotten good success, I should have dismissed it without examination. But since it occupies the foremost place in Justinian's Institutes and Pandects, and since it is manifestly the groundwork of more imposing nonsense, it possesses an extrinsic or accidental importance which demands a passing and brief notice.*

Before I conclude, I will offer a few remarks upon Natural *Rights*. (v.v.) Natural Rights.†

Natural Rights would naturally signify the rights which correspond to Natural Law: Rights which are given by all

* The Author says, "Ulpian and his Law of Nature I shall leave to an Appendix." I cannot find that any such Appendix was written. —*S. A.*

† Hugo, Naturrecht. Blackstone, vol. i. p. 123.

or by most positive systems, and which would exist as *moral* rights though government had never arisen.

But by the term "natural rights," is frequently meant the rights and capacities which are said to be original or innate.

Now original or innate rights, and original or innate capacities to take or acquire rights, are those rights and capacities which a man has as simply being a man, or as simply living under the protection of the state. Such (for example) is the right which Blackstone styles the right to personal security, the right to reputation, or the capacity to acquire rights by conveyance or contract. Rights of this class are styled original or innate as opposed to acquired. They reside in the party without any other title or investitive event than the mere fact of his being a citizen of the community.

[(*Illustrate.*)

[The consideration of them connected with that of *Status*.

In either case, a whole set of rights and capacities rests in the party *uno ictu, et sine speciali titulo*.

Innate or original rights have no connection with natural rights in the other sense of the term: (*e. g.* Right to reputation.)

Blackstone has confounded them with one another, and has supposed that they belong to the law of persons.

(Cause of confusion.)

He has called them absolute rights of persons.

Reason of that denomination.]

NOTES.

The objections to applying the term "Law" to natural or revealed rules are two: 1st, *As* such rules they are *not* law; although it may be incumbent (morally or religiously) upon the Legislator or judge to lend them the legal sanction, and although they become law as soon as they receive it. 2ndly, Many of these natural rules and revealed principles may not be fit for *law*, although their observance as moral and religious rules is necessary to the well-being of society. These objections hold, assuming that there are any such rules.—*Marginal Note in Falck*, p. 100.

The tendency to append International Law to the so-called Law of Nature, illustrates the character of the latter. International law (so far as it is independent of usage,) is a *branch* of Ethics: *i.e.* of Natural Law. But as municipal law is broadly distinguished from Ethics, even those who admitted the existence of a natural *law* were unconsciously led to touch upon it but slightly in their expositions of law municipal. Consistently with the hypothesis of a natural *law*, an exposition of a municipal system should divide it into two parts: viz.: that which, as conforming with natural law *is* (not *ought to be*) Law; and that which, as conflicting with law natural, is *not* Law.—*Marginal Note in Falck*, § 139.

The ancient idea of a Law of Nations (Völkerrecht) is connected with the assumption of a Law of Nature which is universally binding, independently of political obligation.—*Falck*, § 46.

International Law, according to the above-mentioned notion, supposes a Law of Nature: *i.e.* A law obligatory upon all mankind, but wanting the political sanction. If there be no law without that sanction, the admitted maxims for the conduct of international transactions are not Law, but Ethics. Each State may, however, adopt an International Law of its own; enforcing that law by its own tribunals, or by its military force, (at least) as against other nations.

This, however, is not International, but National or Civil Law; *i.e.* in regard to the sanction. For in regard to the subject, and (where there is good faith), to the object, it *may* be styled international.

If the same system of International Law were adopted and fairly enforced by every nation, the system would answer the *end* of law, but, for want of a common superior, could not be *called so* with propriety. If courts common to all nations administered a common system of International Law, this system, though eminently effective, would still, for the same reason, be a *moral* system. The concurrence of any nation in the support of such tribunals, and its submission to their decrees, might at any moment be withdrawn without *legal* danger. The moral system so administered would of course be eminently precise.—*Marginal Note in Falck.*

Origin of Right.

Right has been supposed to originate in an obligation on the part of the person entitled to exercise the right: a moral or religious obligation which could not be certainly fulfilled, if the right were not secured by a legal sanction, and by consequence were not accompanied by a corresponding obligation upon others.

To this it may be objected conclusively that there are many legal rights which the party invested with them is not morally or religiously bound to exercise.

For other accounts of the origin of Right, equally obscure and unsatisfactory, see Falck, § 50.

Right; what.

1°. According to some, it supposes on the part of the person who is invested with it, an obligation to exercise it.

2°. According to others, it is not imposed, but permitted.

3°. Others again consider it as imposed; but derive it from the obligation which is incumbent on other persons to afford the invested person the opportunity of fulfilling his own.

4°. By Kant; Right is derived directly, *not* out of the Moral Law, but out of that "freedom from external obstacles," the enjoyment of which is a necessary condition to the observance of the Moral Law: And Right, thus understood, is consistent with the enjoyment of that freedom by all mankind. This account of

the origin of Right, is substantially the same as the last. "I am bound morally to exercise a certain right. Hence the right itself. But I cannot exercise this right unless I be free from obstacles to the exercise of it: *i.e.* obstacles opposed by other men. Whence again, an obligation upon other men to respect my *freedom from such obstacles*; or in one word my *right*. Kant has thickened the mess by deriving Right from *itself* (under the name of *freedom*), instead of referring it directly to the obligation imposed upon others.—*Marginal Note in Falck.*

"The first and primary end of human laws is to maintain and regulate the *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human law is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and then such rights as are relative, which arising from a variety of connexions, will be far more numerous and more complicated." Blackstone, vol. i. p. 123.

How can they be enforced without imposing obligation? *i.e.* relative to, not other men, but to the establishment of government. Even anterior to government, these supposed natural rights must be relative as to others, and suppose natural obligations imposed *upon* others.—*Marginal Note in Blackstone.*

LECTURE XXXIII.

Origin of term Equity as meaning Law.

As I remarked in the Lecture before the last, the original *jus gentium* is the universal and subsidiary law which was introduced into Italy by the edicts of the *Prætores Peregrini*, and was afterwards extended to the outlying Provinces by the edicts of their Presidents or Governors.

This law, introduced *in subsidium* by the edicts of these Prætors and Presidents, was styled *jus gentium*, or *jus omnium gentium*, because it was *common* to the nations composing the Roman world, and was neither peculiar to the sovereign State, nor to any of the States (formerly foreign and independent) which her victorious arms had reduced to dependence or subjection.

Being common to the nations composing the Roman world, and not peculiar to Rome or any of the subordinate communities, this law, introduced *in subsidium* by the edicts of the Prætors and Presidents, was also styled *jus æquum*, *jus æquabile*, or *æquitas*: That is to say, Law universal or general, and not particular or partial.

Equity as meaning impartiality.

This subsidiary law being distinguished from the peculiar systems to which it was a supplement by its comparatively large and liberal spirit, *æquitas*, which was one of its names, and which (as one of its names) indicated its *universality*, gradually came to signify *impartiality*:—regard to the interests of *all* whose interests ought to be regarded, as distinguished from exclusive or partial regard to the interests of *some*.

This is the secondary sense of the term *æquitas*, when it is used, in a secondary sense, with perfect propriety: Though the term is often applied, by an improper extension of its meaning, to some *system* of *law*, or to some *principle* of direct or judicial *legislation*, which the speaker or writer, for any reason, praises or commends.

Equity as meaning any law, or principle of legislation, which the speaker means to commend.

Of all the various objects which are denoted by this slippery expression, the most interesting, and the most complex, are those portions of Roman, and of English *law*, which arose from the Edicts of the Prætores Urbani, and from judicial decisions of our own Chancellors as exercising their extraordinary jurisdiction. And, accordingly, those portions of *Roman* and of English *Law*, are *the Æquitas*, or *the* Equity, to which I shall more especially direct my attention.

But before I proceed to "*Equity*" as meaning a department of *Law*, I will briefly advert to a few of the other and numerous meanings which are not unfrequently attached to that most ambiguous term. For "equity" (as meaning law) being often confounded with "equity," as meaning something different, gross misconceptions of "equity," as denoting a portion or department of positive law, are commonly entertained by the simple laity, and not unfrequently by lawyers.

Confusion of Equity as meaning Law, with Equity in its other senses.

Supposition that "Law and Equity" is a universal and necessary distinction.

If I liked, I could point at books and speeches, by living lawyers of name, wherein the nature of the Equity administered by the Chancellor, or the nature of the jurisdiction (styled extraordinary) which the Chancellor exercises, is thoroughly misapprehended:—Wherein the anomalous distinction between Law and Equity is supposed to rest upon principles necessary or universal; Or (what is scarcely credible) wherein the functions of the Chancellor, as exercising his extraordinary jurisdiction, are compared to the *arbitrium boni viri*, or to

Confusion of Equity as meaning Law, with Equity as meaning *arbitrium*.

the functions of an *arbiter* released from the observance of rules.

It is manifest on a moment's reflection, that, if our Courts of Equity were arbitrary tribunals, they would destroy the security, and the feeling of security, which ought to be the principal end of political government and law.

Equity=universality. *Ergo*, Impartiality. *Ergo*, applicable to any good law, etc.

Taken in its primary sense, equity, or æquity, is synonymous with *universality*. In which primary sense it was applied to the *jus gentium* of the earlier Roman Law, because the *jus gentium* of the earlier Roman Law was *æquum*, or common, and not restricted or particular.* The *jus gentium* to which it was applied being distinguished by comparative fairness, æquity came to denote (in a secondary sense) *impartiality*. And impartiality being good, æquity is often extended (as a vague name of praise) to any system of law, or to any principle of direct or judicial legislation, which, for any reason, is supposed to be worthy of commendation.

The applications of the term "æquity" are extremely numerous. But, in almost every instance wherein it is applied, one of the meanings now indicated is the *basis* of the complex notion which the term is employed to mark.

Equity as meaning extensive (or restrictive) interpretation, *ex ratione legis*.

First:)† There is a species of interpretation or construction (or rather of judicial legislation disguised with the name of interpretation) by which the defective but clear provisions of a statute are extended to a case which those provisions have omitted. As I shall endeavour to shew (when I attempt to examine the difference between direct and judicial legisla-

* Properly an abstraction of *æquum* (jus), but, like *justitia*, is made mother of its own parent: *e.g.* when it means good principles of legislation.

† It appears from the MS. that the author intended to use the passage beginning at this line and ending at p. 278, towards the construction of an "Essay on Codification," for which some materials exist. It seems probable that an incomplete "Excursus on Analogy" and a short Essay on "Interpretation" (which is perfect) had the same destination.—*S.A.*

tion) *this* species of interpretation or construction is *not* interpretation or construction properly so called. The specific provisions of the statute, and the specific intention of the lawgiver, are perfectly unequivocal or certain. It is certain that the case is not embraced by the law, and was not present to the mind of the lawgiver when he constructed the law. But since its provisions *would* have embraced the case, if its author had pursued consequentially his own general design, the judge (exercising a power expressly or tacitly given to him) completes the defective provisions actually comprised in the law; and supplies the defective intention which its maker actually entertained, from the predominant purpose or end which moved him to make the statute. The judge extends the law to the omitted case, because the omitted case falls within the general design, although it is not embraced by the actual and unequivocal provisions. Or, adopting the current but absurd expression, the judge *interprets* the law *extensively*, in pursuance of its reason or principle.

The so-called interpretation which I have briefly and loosely described, is widely different from the *genuine* extensive interpretation which takes the reason of the law as its index or guide. In the latter case, the reason or general design is unaffectedly employed as a *mean* for discovering or ascertaining the specific and doubtful intention. In the former case, the reason or principle of the statute is itself erected into a law, and is applied to a *species* or case which the lawgiver has manifestly overlooked. The *bastard* extensive interpretation *ex ratione legis*, is not unfrequently styled *æquity*. Or a law is said to be *interpreted* agreeably to the demands of *æquity*, when its provisions are extended to an omitted case, because that omitted case falls within its reason.

Now in this application of the term "*Æquitas*," the radical idea is "*uniformity*" or "*universality*." The law (it is supposed) should be applied *uniformly* to *all* the cases

which come within its principle. For the law (it is assumed) would have embraced *all* such cases, if the legislator had adverted completely to the consequences which its principle implies. "Quod in re pari valet, valeat in hac quæ par est. Valeat *æquitas:* quæ paribus in causis paria jura desiderat." For the same reason, this bastard extensive interpretation *ex ratione legis* is frequently styled "analogical."

The cases which the law omits (but which fall within its principle), and the cases which fall within its principle, and which it actually includes, are *analogous.* Or (changing the expression) they are resembling cases, *with reference to that common principle,* in spite of the differences by which they are distinguished when viewed from other aspects. And, since they are resembling cases with reference to the principle of the law, *analogy* (as well as *æquity*) is said to require, that the law should be applied to *all* of them in an æquable or uniform manner. Æquity and Analogy (as thus understood) are exactly equivalent expressions. "Æquitas (say the lawyers) paribus in causis paria jura desiderat." "Analogia (say the Grammarians) est similium similis declinatio."

In that bastard interpretation *ex ratione legis,* which is styled *extensive,* the law is applied to a case which it clearly omits, because the omitted case falls within its principle. In that spurious interpretation *ex ratione legis,* which is styled *restrictive,* the law is *not* applied to a case which it certainly includes, because the case, which is included by its actual provisions, is not embraced by the general design of the lawgiver.

By Grotius, the term "*æquity*" has also been applied to this last-mentioned species of pretended interpretation or construction. Or, according to Grotius, a law is also interpreted agreeably to the demands of *Æquity,* when it is *not* applied to a case which it actually includes, but which (looking at its purpose) its provisions should not embrace.

Now the term "æquity," as thus applied, hardly imports *uniformity* or *universality*. But still it imports the *consistency* which is implied in uniformity, and which is the ground of the so-called extensive interpretation *ex ratione legis*.

By the so-called extensive interpretation *ex ratione legis*, the provisions of the law are *extended* agreeably to its principle. Why? Because it is presumed that its maker must have wished to be consistent with himself. And, for precisely the same reason, the provisions of the law are *restricted*, agreeably to its principle, where its provisions and principle positively conflict. In either case, it is presumed that the author of the law must have wished to be consistent with himself; and the defect or incoherency of his specific and proximate intention, is accordingly supplied or corrected from his general and remote design. But the term "æquity," as applied to *restrictive* interpretation, certainly deflects considerably from its primary meaning. It scarcely imports uniformity; although it imports the consistency (—the harmony or *elegantia*) which uniformity necessarily implies.

By the ancient writers, "æquitas" (I believe) is never applied to *restrictive* interpretation. The "*æquitas*" of Cicero and the Classical Jurists (when they mean by *æquitas*, interpretation or construction) is the so-called *extensive* interpretation *ex ratione legis* of modern writers upon Jurisprudence: the "æquitas, quæ *paribus* in causis *paria* jura desiderat."

It may, indeed, be doubted (as I shall shew in the proper place), whether the so-called interpretation, which *restricts* the operation of statutes, was permitted by the Roman Law, or ought to be permitted by any.

It may seem, at first sight, that the pretended interpretation which extends, and the pretended interpretation which restricts are nearly alike. For, in either case, the specific intention, which the provisions of the law evince, are

amended by the general design which predominated in the mind of its author.

But (as I shall endeavour to shew in the proper place) the consequences of the former and the consequences of the latter are widely different. Defects in the provisions of a law may be supplied from its manifest reason, with little or no inconvenience. But if judges might abrogate laws, wholly or in part, whenever their actual provisions were not consistent with their grounds, all statute laws would become uncertain, and the cases which they include would be abandoned to the *arbitrium* of the tribunals: "Cessante ratione legis cessat lex ipsa," is a maxim which sounds well, but which tends directly to tyranny.

Equity as meaning judicial impartiality.

Secondly:) Equity often signifies *judicial impartiality:* That virtue which is practised by judges, when they administer the law, agreeably to its spirit or purport, uninfluenced by extrinsic considerations.

In this sense, Equity has been defined by many jurists, "The application of Statute Law to the given case, agreeably to the specific intention or the general design of the legislator." "*Æquitas* nihil est (says a celebrated modern jurist) quam *benigna* et *humana* juris scripti interpretatio, non ex verbis, sed à mente legislatoris facta." "*Benignius* (say the Pandects) leges interpretandæ sunt, *quo voluntas earum conservetur.*" In which definition and precept, "Æquity" and "Benignity" would seem to be merely synonymous with "sincerity" and "impartiality." The judge is admonished to apply the law agreeably to the specific intention or general design of the legislator.

Thirdly:) Taken in the significations which I have now considered, Equity means something determinate and precise. But, frequently, it signifies nothing more than the arbitrary pleasure of the judge, disguised with a name which imports praise, and which therefore is specious and captivating. Equity, as defined by Cicero and

Equity as meaning *arbitrium.*

others, is nothing more than the mere *arbitrium* of the judge, or is nothing more than the *arbitrium* of the judge, as determined by narrow considerations of particular good and evil.

According to some, it is the office of Equity (meaning the Equity of Judges as exercising their judicial functions) to correct the particular evils which flow from the generality of the Law. "*Æquitas* (says Cicero in precisely the same spirit) est laxamentum juris." And here I may remark, that if the general rule be good in the main, the equity which affects to correct its particular evil consequences is clearly mischievous. It is hardly possible to imagine a case, wherein the application of a general rule is not productive of some consequence which a good-natured judge would wish to avert. So that if it were competent to the judge to apply or dispense with rules, agreeably to his notions of particular consequences, there would be no law to which expectations could be accommodated, and by which conduct could be guided.

Where Rules are bad (and the Legislature is incapable or supine) it is indeed expedient (as I shall shew in a future Lecture) that the judge should do the business of the supine or incapable legislature, and abrogate or amend the pernicious or defective law. But to abrogate or amend a law directly or indirectly, is widely different from the Equity which allows the law to remain, and simply dispenses with it in specific cases. By abolishing or amending the law once for all, partial evil may be inflicted. But the bad law is itself removed, and a good rule of conduct is substituted in its stead. The Equity which dispenses with the law in particular instances, leaves the standing nuisance untouched, and renders all Law utterly uncertain.

The evils of the Equity which I have now described are not badly put in the following passage: which I take from a tractate, or dissertation, by a certain *laudatus* but somewhat obscure writer, "pro summo jure, contra æquitatis defensores."

"Non sunt illæ injuriæ, quas subtilitatis studium et observatio juris introduxit, tam lamentabiles quam illi dolores quos parit æquitas. Est longe melius unum quandoque aut alterum lædi, quam fortunas hominum â solâ æquitate et arbitrio judicis, seu, ut rectius dicam, â fato dependere. Quis volubilem adeo et incertam æquitatem ut juris justitiæque normam agnoscet? Admissâ *hac* justi normâ merito conqueri possumus, leges habere cereum nasum, et quamcunque in partem inflecti posse."

Equity, as meaning standard, or legislative (or other ethical) principles.

Fourthly:) I remarked in a former Lecture that the *jus naturale* or *gentium* of the classical jurists, and the Law Natural of modern writers on jurisprudence, often mean nothing more than that standard to which, in the opinion of the speaker, law should conform.

The same may be said of *æquitas*, or *naturalis æquitas*.

In this sense it is said that equity is the spirit of laws: or (as the French have it) "L'équité est l'esprit de nos lois." In this sense of the term, writers often talk of an *Æquitas legislatoria*. In this sense, *Æquitas* is reckoned by Cicero amongst the sources* of Law. And, in this sense, innovating judges (whether Prætors, Chancellors, or Chief Justices) have generally applied the terms "equity" or "equitable" to the new rules which they have ventured to introduce.

Equity, as meaning performance of imperfect obligations.

As meaning Morality.

Fifthly and lastly, Equity is often synonymous with the performance of imperfect obligations:† With morality;‡ (whether positive morality or morality as it ought to be, is usually left uncertain): Æquitas est honestas.

Jus gentium is sometimes used in the same sense.

* *i. e.* the remote causes.—*Hugo, Gesch*, p. 342.

† Mühlenbruch, Vol. I. p. 76.

‡ "Velut erga Deum religio: ut parentibus et patriæ pareamus." L. 2, D. de J. et J.

NOTES.

Origin of application of term to equity as meaning Law.

The term "equity," as meaning a portion of positive law, seems to be equivalent to *impartiality* or *equality*: *E.g.* Older *Jus gentium.*

Again: *Jus prætorium,* either as having borrowed largely from that *jus gentium,* or as being itself of a more equal and impartial character than the *jus civile*: *e.g.* Giving rights to strangers, persons in *potestate,* etc.

Again: Expected of Prætors and other legislating magistrates, that their law should be *æquum, et non ambitiose factum.* Thence, applied to any law which any one wished to commend; especially by innovating judges seeking to commend to others their innovations.

Equity,—not the name of *jus prætorium,* but the law itself—said to arise from the suggestions of the personified abstraction styled "equity."

Seems, in England, to be the name of the law. The law would be called better, "Chancery Law." Circumlocutions for Equity Law.

LECTURE XXXIV.

Various equivalent circumlocutions for "Equity" as meaning positive Law, or a portion or department of a system of positive Law.

HAVING examined certain meanings of the term "Equity," as *not* denoting Law (or a portion of some body of law) I proceed to those portions of certain bodies of law, which are distinguished by the name of "equity," or by the epithet of "equitable;" or which are said to owe their creation to the suggestions of "equity;" or which are said to be remarkable for their "equitable" spirit; or which are said to rest exclusively, or in the main, upon "equitable" grounds or principles.

Of all those portions or departments of bodies or systems of Law, which have gotten the name of "Equity" or the epithet of "equitable," the most remarkable and interesting are the following: namely, that portion or department of the Roman Law, which was introduced by the perpetual Edicts of the *Prætores Urbani;* and that portion or department of the Law of England which is exclusively administered by tribunals styled "Courts of Equity," and was introduced by judicial decisions of the English Chancellors as exercising their extraordinary jurisdiction.

Equity of Prætors called *jus prætorium; æquitas* not being the Law which he makes, but the (personified) principle of legislation (utility or other) which

That portion of the Roman Law which was introduced by the perpetual edicts of the *Prætores Urbani,* is commonly styled *Jus prætorium.* That portion of the Law of England which is exclusively administered by Courts styled "of Equity," I would call "*Chancery Law.*" For, though it is not administered by the Court of Chancery only, it was introduced, and (in the

main) has been formed, by judicial decisions of that high tribunal.

determines him to make it. English Equity ought to be called, rather, *Chancery Law.*

The application of the term "Equity" to that portion of our Law, and of the phrase "Courts of Equity" to the tribunals by which it is administered, is grossly improper, and leads to gross misconceptions. Taking the term "Equity" as meaning a species of interpretation; or as meaning the impartiality which is incumbent on judges and arbiters; or as meaning judicial decision not determined by rules; or as meaning good principles of direct or judicial legislation; or as meaning the cheerful performance of imperfect duties; or as meaning positive morality, or good principles of deontology, the Courts styled "of Equity" and the Courts styled "of Law" are equally concerned with Equity, or are equally strangers to Equity.

Taking equity as *not* meaning law, Courts of Equity and Courts of Law are equally concerned with it, or equally strangers to it.

Having premised these remarks, together with the prefatory explanations contained in my last Lecture, I shall endeavour to compare or contrast Prætorian and Chancery Law as perspicuously and as correctly as the brevity to which I am constrained will permit.

This comparison or contrast will subserve a double purpose.

First: It will show that the distinction between Law and Equity (meaning by equity a portion or department of law) is not deducible from the universal principles of jurisprudence, but is accidental and anomalous: that in every system of law, in which the distinction obtains, the import of the distinction is singular or peculiar, or (changing the expression) that the distinction between Law and Equity, which obtains in *one* system, resembles in name, rather than in substance, the distinction between Law and Equity which obtains in *another.*

Equity an historical and particular notion.

Secondly: By previously comparing or contrasting Prætorian and Chancery Law, I shall be able to state and ex-

amine, with more clearness and effect,—the distinctive properties of direct and judicial legislation; the respective advantages and disadvantages of the two species; with the much agitated and interesting question, which regards the expediency of reducing bodies of Law into formal systems or Codes.

But in order that I may institute this projected comparison or contrast, and may make it subserve the purposes at which I have now pointed, I must state the nature of the *jurisdiction* exercised by the *Prætores Urbani;* and also the nature and causes of the *direct legislative power,* which they first exercised with the tacit, and then with the express authority of the sovereign Roman People.

The history and nature of the jurisdiction exercised by the Court of Chancery, is, I may confidently assume, well understood by my hearers. To *that,* therefore, as to something sufficiently known, I shall merely allude.

Criminal Jurisdiction *liberâ republicâ,* with distinction of wrongs into *public* and *private.*

In *liberâ republicâ* or before the virtual dissolution of the free or popular government, criminal cases were regularly tried and determined by the assembled Roman People: Though, by virtue of particular and exceptional laws, the particular criminal cases, to which those laws related, were tried and determined by bodies of *judices,* or jurymen, to which, as to committees of its own number or body, the sovereign people delegated its judicial powers.

Hence it is, that the parts of the Institutes and Pandects which relate to criminal procedure, bear the title "*De judiciis publicis.*" And hence it is, that "*crimen*" is often styled in the language of the Roman Law "*delictum publicum.*" Since the regular or ordinary tribunal was the people, community, or *public,* the trial and judgment were naturally styled "*public;*" and the epithet naturally applied to the trial and judgment, was as naturally extended to the delict or offence itself.

After the popular government had been virtually dissolved, and the trial of criminal cases gradually withdrawn from the people, criminal procedure and crimes still kept the names of "*judicia et delicta publica:*" Although the epithet "public" (in its primary import) was now no more applicable to criminal procedure or crimes than to civil procedure or the delicts styled "private."

And since crimes and criminal procedure kept the epithet of "public," although (in its primary import) it had ceased to apply with propriety, the Classical Jurists justified or accounted for the epithet in the following manner. They supposed that crimes affect the *public* or *community;* whilst the mischief of private delicts, and of other civil injuries, is limited to the injured individuals. That it is, therefore, the interest of the public to pursue or prevent crimes; whilst the pursuit or prevention of private delicts, and of other civil injuries, may be left to the discretion of the individuals who feel or who are obnoxious to the damage.

Civil Jurisdiction of Prætores Urbani.

In the earlier ages of the Roman Republic, civil jurisdiction (or jurisdiction properly so called) was exercised by the Consuls. But as the Consuls were commonly busied with military command, a magistracy styled "Prætura" was afterwards created; and to the magistrate by whom this office was filled, the civil jurisdiction originally exercised by the Consuls was completely transferred.

When I say that civil jurisdiction was originally exercised by the Consuls, and afterwards by the Prætors (as representatives or substitutes of the Consuls), I understand the proposition with certain limitations. For, in certain excepted cases, civil jurisdiction was exercised by magistrates styled *Centumviri;* by the *Ædiles* (or the conservators of public buildings, roads and markets); and also by the *Pontifices* (or priests). But in respect of my present purpose, these exceptions are immaterial, and may therefore be dismissed with this brief and passing notice.

The tribunal of the original Prætor (or of the Prætor who was appointed as the representative or substitute of the Consuls) was fixed immovably in the City of Rome: And (owing to the cause which I explained in a former Lecture) his jurisdiction was originally restricted to civil cases arising between Roman Citizens. Consequently, after the subsequent appointment of the *Prætor Peregrinus*, and of Presidents or Governors (sometimes styled "*Prætors*") to the outlying provinces, he was styled, by way of distinction, *Prætor Urbanus*. When that distinctive epithet was not needed, he was styled *Prætor* simply.

Order of *procedure* before the Prætor as exercising his judicial functions.

The judicial functions of the Prætor bore less resemblance to the functions of our own Court of Chancery, than to those of our own Court of Common Pleas, or of our other Common Law Courts (regarded as civil Tribunals.)

For, in causes falling within his jurisdiction, the ordinary or regular procedure was this.

The Prætor *alone* disposed of the cause, or the Prætor *alone* heard and determined, in the following events:

First, If the defendant confessed the *facts* contained in the plaintiff's case, without disputing their sufficiency *in law* to sustain the demand:

Secondly, If the contending parties were agreed as to the *facts*, but came to an issue of *law*:

Thirdly: If the defendant disputed the truth of the plaintiff's statement, but the statement was supported by evidence so short, clear, and convincing, that the Prætor could decide the issue of fact without an elaborate and nice inquiry.

But if the parties came to an issue involving a question of fact, and the evidence produced to the Prætor appeared doubtful, the Prætor defined or made up the issue, or put the disputed point into a *formula* or statement.

The *formula* (or statement of the issue) being prepared by the *Prætor*, the issue was submitted to the decision of

a *Judex* or *Arbiter*: Who (it seems) was appointed for the particular or specific occasion; and is rather to be regarded as a *juryman* (taken *pro re natâ* from the citizens at large) than as a permanent judicial officer.

The *judex* or *arbiter* thus appointed, not only inquired into the question of fact, but gave judgment generally upon the issue submitted to his decision.

The *formula* (or statement of the issue), together with the judgment of the *judex* or *arbiter*, was remitted to the *Prætor* (or to the Court above).

The judgment of the *judex* or *arbiter* was then carried into *execution* by or by the command of the Prætor: By whom (in every cause) the consummation, as well as the initiative of the procedure, was superintended or directed.

Jurisdictio, what. *Coercitio. Imperium: merum: mixtum.*

(*Vivâ voce.*) *Jurisdictio* was the power of hearing and determining, and of assigning a *judex* when necessary.

It was distinct from the *coercitio* (or power of compelling and restraining) which might be necessary for the purpose of carrying the judgment of the *Prætor* or *Judex* into effect.

The power of compelling or restraining (when vested in criminal tribunals) was called *imperium*, or *imperium merum*; and is often synonymous with our "criminal jurisdiction." "Jurisdiction" (in Roman law-language) is seldom or never applied to criminal jurisdiction. When combined with civil jurisdiction, the power of coercing was styled *imperium mixtum*.

Imperium merum, as well as *mixtum*, resided in the Presidents or Governors of Provinces.

The Prætors had *imperium mixtum* only.

The *Præfectus urbi* (under the emperors), *imperium merum* only.

Order of *procedure*, before the Prætor, etc.

[How the functions of the *Prætor* resembled those of our Common Law Courts. *Judex* gave judgment as well as verdict. With us a cause goes to a jury (on issue of fact) inevitably.

How those of the Chancellor.

Nature of the issue or *formula*. Often involved questions of Law. *Judex* (like jury) might find specially.

Natural procedure. Afterwards altered.

Procedure before Prætor was the "natural procedure" of Mr. Bentham, and like our own process of pleading at its origin.*

Jus et Judicium.

Actiones *utiles* et *in factum*. (See next Lecture.)

Procedure on an Interdict. See next Lecture.

In certain cases, the Prætor gave provisional judgment, or issued a provisional command, on an *ex parte* statement of the plaintiff.

The interdict (in this respect), comparable to an Injunction or Madamus.

The defendant, on receiving command, might shew cause. And, then, if doubtful issue of fact, the issue went to a *judex*, as in ordinary cases.

Cognitio.

Cognitio: Or proceeding *extra ordinem.*

Voluntary jurisdiction.

Voluntary jurisdiction. Emancipation, etc. *In jure cessio.*†

The last, comparable to our fines and recoveries.

Alteration of the old judicial Constitution.

Ultimately, *cognitio (extra ordinem)* became universal.

All causes determined *extra ordinem. i. e.* Division of procedure between higher and lower judge destroyed.]

The only *close* resemblance between Roman and English equity appears to be this: that under each system the law corrected or abrogated by the so-called equity law is allowed to exist in form.

Another resemblance: that Roman and English Equity has

* Natural procedure afterwards altered.

† Gaii, Lib. II. § 22.

Res mancipi were alienable by Mancipation (a fictitious sale); *in jure cessio* (a fictitious suit); or (if corporeal), by usucapion working upon simple tradition.—*Marginal note in Gaius.*

been formed to some extent by analogy on the law to which it is contrasted: the one, by analogy to *jus civile (subsequitur jus civile)*; the other, to Common Law *(sequitur legem)*. Of course they must have deviated; but analogy was observed to some considerable extent. This, however, is not a proof of resemblance, since much of every body of innovating law is formed by the same analogy.

LECTURE XXXV.

FROM the judicial functions of the *Prætores Urbani*, I proceed to that power of direct legislation, which they exercised (at first) with the tacit consent, and (afterwards) with the express authority of the sovereign Roman People.

The direct legislative power of the Prætors was originally confined to *Procedure* but afterwards extended to *Substantive Law.*

Originally and properly, the Prætor was merely a judge. It was his business to *administer* the Law, established by the Supreme Legislature, in specific cases falling within his jurisdiction.

But though it was his business to *administer* the law established by the supreme legislature, the manner of administration, or the mode of procedure, was left, in a great measure, to his own discretion. Accordingly, every Prætor, on his accession to the Prætorship, made and published *Rules of Procedure or Practice:* Rules to be observed, during his continuance in office, by those who might happen to be concerned (as parties, or otherwise) in causes coming before him.

Such, originally, was the direct legislative power exercised by the Prætors. It extended to procedure or practice, but not to the substantive law which it was their business to administer. It may be likened to the power of making *Regulæ Praxis* which is not unfrequently exercised by our own Courts of Justice.

But, in consequence of incessant changes in the circumstances and opinions of the Roman community, corresponding changes in its institutions were absolutely necessary. And, inasmuch as the demand for innovation was slowly and imperfectly supplied by the supreme and regular legislature,

the Prætors ventured to extend their direct legislative power, and to amend or alter the substantive law which properly it was their office to administer.

Difference between general and special Edicts.

The Law introduced by the Prætor (whether it consisted of *substantive* law, or of rules of procedure or practice) was introduced (for the most part) by their *general* Edicts, or by their Edicts (simply so called).

[Remark on the distinction between substantive and adjective law. I adopt it for the present. As I shall shew hereafter, the distinction beween substantive and adjective cannot be made the basis of a just division.

Substantive law.	Adjective law.
Material law.	Formal law.
Le *Fonds* du droit.	La *Forme*.
The Law.	Rules of procedure or practice.]

For Edicts, Orders, or Præcepts, issued by the Prætors, were of two kinds: general and special.

A general Edict was made and published by a Prætor in his legislative capacity. A *special* Edict was made and issued by a Prætor in the exercise of his judicial functions.

A general edict consisted of a rule or rules, which had no specific relation to a specific case or cases, but regarded indifferently all cases of a given class or classes. A special edict was issued in a specific cause; was addressed to a person or persons concerned in that cause, and specifically regarded the person or persons to whom it was addressed.

In short, a general edict was a statute, or a body of statute law; and was made and published by its author *as a subordinate legislator*. A special edict was an order, made in a specific cause; and was made and issued by its author *as a judge*.

It appears, then, that the term "Edict" was often applied indifferently, to the general rules or orders which were published by the Prætors as legislators, and to the special orders or commands which they made and issued as judges.

But when the Edicts of the Prætors are mentioned without qualification, their general or legislative edicts, and not their particular or judicial, are commonly or always referred to by the writer.

In like manner, the *jus edicendi*, which is ascribed to the Prætors, denotes their power or right of making general rules, and not their power or right of making special orders in the exercise of their judicial functions. And so, "*edicere*," or "*jus edicere*" is to legislate *directly*: The act of *judging* (or of applying existing law in specific causes) being denoted by the expression "*jus dicere*" (or "*jus decernere*").

In the orations of Cicero against Verres, "*edicere*" and "*decernere*" are directly and distinctly opposed in the senses which I have now referred to. For one of the charges against Verres (who as Governor or President of a province was invested with the *jus edicendi*) is this: quod aliter, atque ut *edixerat*, *decrevisset*:—that in the decrees or orders, which he issued as judge, he violated the rules, which he had established in his legislative capacity, by his own general edict. In like manner, the *general* constitutions promulged by the Emperors as legislators (when opposed to the decrees which they issued as judges in the last resort) are frequently styled "*edictal.*"

Interdicere (as well as *dicere* and *decernere*) is also opposed to *edicere*. But an *interdictum* was a special and judicial order of a particular species. It was a provisional or conditional order made by the Prætor on the *ex parte* statement of the applicant: The party to whom it was addressed having the power of shewing cause why the order should not be carried into effect. In short, it was what would be styled, in the language of our own law, an *injunction* or *mandamus*.

Why the general Edicts of the Prætors were styled *perpetual*.

Any Prætor might publish a general edict at *any* period during his stay in office. But, generally speaking, all the rules or laws, which were published by any given Prætor, were published

or promulged *immediately after his accession*, and were comprised in *one* edict, or constituted one edict.

The edict which was published by any given Prætor, was not legally binding upon his successor in the Prætorship, and only obtained as Law till the end of the year during which he himself continued in office. And, accordingly, the general edicts of the Prætors, or their edicts simply so called, are styled by Cicero and others "*Edicta annua*," or "*leges annuæ*."

But though a general edict was merely *annual* (or merely obtained as Law while its author continued in office), the general or legislative Edicts, made and promulged by the Prætors, are nevertheless styled "*perpetual*." Now the epithet "perpetual" (taken in its ordinary meaning) is hardly applicable to a law or statute of a certain or definite duration. A *perpetual* law or statute (taking the terms in their ordinary meaning) would seem to denote a law which was intended to be irrevocable, or which (at least) was intended to endure until some competent authority should abrogate or repeal it.

Accordingly, the epithet "perpetual" (when applied to the legislative edicts made and published by the Prætor) indicates their generality, and not their duration. When thus applied, the epithet "*perpetual*" is opposed to "*occasional*," and is used to distinguish the *general* edicts of the Prætors from the *special* edicts or orders which they issued in their judicial capacity.

And (taking the epithet "perpetual" in this meaning) it was justly applicable to these general or legislative edicts, although their duration was definite or certain. For a special or judicial edict was issued in a given cause; was restricted to the cause in which it was issued; and *expired* with the specific exigency which it was intended to meet. It was an occasional order concerning a particular case, and not extending generally to cases of a class. In the language of the Roman Law, it was made and issued "*pro re natâ*" (or "*prout res incidit*").

But an edict issued by a Prætor, as exercising his legislative powers, consisted of general Rules. It was neither provoked by a *specific* occasion, nor did it expire with any of the specific occasions on which its general provisions were actually applied. It was intended to apply to entire classes of cases; and was applicable to every case belonging to any of those classes, so long as the Prætor by whom it was promulged should occupy his office. In the language of the Roman Law, it was made and issued, "*non* prout res incidit, sed jurisdictionis *perpetuæ* causâ." It was not provoked by a specific incident or occasion; but was intended to serve as a guide to all who might be concerned in causes, so long as the Prætor who issued or promulged it should continue to exercise the jurisdiction annexed to his office.

The epithet "*perpetual*" when applied to the Edict of a Prætor, is therefore synonymous with "*general*" (as opposed to "*specific*" or "*occasional*"). It denotes that the edict consisted of general provisions; and not that it was calculated to endure *in perpetuum*, or until it should be abrogated or repealed by a supreme or subordinate legislature. As opposed to general and legislative edicts, special and judicial edicts are frequently styled *repentina*: An epithet which does not denote that they were issued in haste, but that they were made on the spur of a specific or particular occasion.

Edictum tralatitium, or the Edict of the Prætor or Prætors.

The Prætorian Edict, which was in force at any given period, was properly the edict of the Prætor who then occupied the Prætorship. For the edict which was promulged by any given Prætor, expired with the year during which he stayed in the office, and yielded to a similar edict promulged by his immediate successor.

But though the edict of every foregoing Prætor was superseded by the edict of his immediate successor in the office, every succeeding Prætor inserted in his own edict, all such rules and provisions, contained in the edict of his pre-

decessor, as had found favour with the public at large, or had met with the approbation of the classes who influenced the community. For, as the legislative power of the Prætors was derived from the tacit consent of the sovereign people, its exercise was inevitably determined by general opinion.

Such being the case, the edict promulged by every succeeding Prætor was a simple or modified copy of the edict promulged by his predecessor. He simply *republished* the edict which his immediate predecessor had issued, or else he republished it with such omissions and additions as were demanded by general opinion or suggested by general expediency. If he simply copied the edict which the foregoing Prætor had promulged, the edict promulged by himself was simply *translatitious*, or *tralatitious*. In other words, it merely consisted of rules and provisions, which he translated, (transferred, or adopted) from the edict of his immediate predecessor.

If he copied the edict of his predecessor with certain modifications, the edict promulged by himself was partly *Edictum tralatitium*, and partly *Edictum novum*. So far as it consisted of provisions taken from the edict of his predecessor, it was *Edictum tralatitium*. So far as it consisted of provisions devised and introduced by himself, it was not *Edictum tralatitium*, but *Edictum novum*.

It rarely happened that the general Edict of a Prætor was purely *tralatitious*. For incessant changes in the position and opinions of the community created an incessant demand for corresponding changes in its law. And since this continued demand was slowly and imperfectly satisfied by the supreme and ordinary legislature, the Prætors were provoked to supply the demand by a continued though cautious exercise of their legislative powers.

It is remarkable that all the edicts of all the successive Prætors are frequently considered as constituting *one* Edict. They are frequently styled (in the singular number) "*the* Edict;" "*the* Prætorian Edict;" or "*the* Edict of the

Prætors or Prætor." The process of translation or transference which I have attempted to describe, explains this form of expression.

With reference to its *promulgation*, the general Edict, which was in force at any given period, was the edict of the Prætor who then occupied the Prætorship. But with reference to its *contents*, or to the rules of which it consisted, it was partly the production of the Prætor who then occupied the Prætorship, and partly the production of his various predecessors in the office. For much of the edict promulged by every Prætor, was translated into the edict promulged by his immediate follower. With reference, therefore, to their contents (though not with reference to their promulgation), the series of edicts, issued by a series of Prætors, constituted an indivisible whole, or formed a continuous chain. Although the edict for the time being had been promulged by the actual Prætor, his predecessors as well as himself, had lent a hand to the formation of its provisions.

And here I may remark, that, after the Prætors had legislated through a long tract of time, the general Edict of the Prætor for the time being naturally consisted (for the most part) of derivative or translatitious rules. For as the legislative power of the Prætors was commonly exercised discreetly, the rules, introduced originally by the Prætor for the time being, were comparatively few and unimportant. They bore a small and insignificant proportion to those provisions of his predecessors which were also a part of his edict, and which had accumulated through a series of ages.

The "jus prætorium" was formed by the *Edicts* of the Prætors.

The aggregate of rules, which had been introduced by successive edicts, and which were embodied in the edict obtaining for the time being, formed or constituted, at any given period, the portion of the Roman Law which was styled "*Jus Prætorium*."

A part of the Roman Law (like much of the Law of England) was made by judicial decisions on specific or particular cases. Decided cases, serving as *precedents*, formed a portion of the Roman, as well as of our own system. In the language of the Roman Law, as well as in the language of the English, such decided cases are frequently *called* precedents:—"*præjudicia.*" More commonly, however, such decided cases are styled "*res judicatæ:*" And their influence (as precedents) upon *subsequent* judicial decisions, is styled "*auctoritas* rerum *perpetuo* similiter judicatarum."

Now as most civil cases fell within the jurisdiction of the Prætor, most of the civil law, which was formed by judicial decisions, *might* have been styled with propriety "prætorian law." Where the Prætor decided without an *arbiter* or *judex*, the questions of law which happened to arise in the cause were of course determined by himself. And where he remitted the cause to a *judex* or *arbiter*, the questions of law, which the *formula* happened to involve, were probably decided in effect by the Court above, and not by the secondary or subordinate tribunal. I stated in my last Lecture, that, when a question of law arose before the *judex*, he commonly took the opinion of the Court above, and gave judgment accordingly. I have not been able to discover, whether it was *incumbent* on the *judex* to take the Law from the Prætor, and whether the latter could grant a new trial in case the *judex* or *arbiter* decided against the law.

But though most of the law, formed by judicial decisions, was made by the Prætors (as judges), and *might* have been *styled* "prætorian," the term "*jus prætorium*" was exclusively applied to the law which they made by their general edicts in the way of direct legislation.

This is a fact which I cannot account for satisfactorily; but which (perhaps) may be explained in the following manner.

Though part of the Roman Law was formed by judicial

decisions, that part of it which was so formed bore an insignificant proportion to the rest of the system. Demand for law of the kind was superseded, in a great measure, by the law which the Prætors introduced in the exercise of their legislative powers. And since the law which they introduced through the *medium* of their general edicts, eclipsed the law which they established by their decisions on specific cases, general attention was fixed on the former, whilst the existence of the latter was generally forgotten. The former being *conspicuous*, and being *conspicuously* the work of the Prætors, it obtained exclusively the name of *jus prætorium*, although the name *might* have been extended to the latter.

The *jus prætorium* a part of the *jus honorarium*.

The *jus edicendi* (or the power of legislating directly by general edicts or statutes) was not confined to the *Prætores Urbani*. It was exercised by every magistrate of a superior or elevated rank, with reference to such matters as fell within his jurisdiction. It was exercised by the high priests or *Pontifices maximi*. It was exercised by the *Ediles*, or the surveyors and curators of public buildings, roads, and markets. With reference to cases arising in Italy, between provincials and provincials, or between provincials and Roman citizens, it was exercised by the *Prætores Peregrini*. In the outlying provinces, it was exercised by the Proconsuls, and other Presidents or Rulers, to whom the government of those provinces was committed by the Roman People.

The rules which were established by the general edicts of the magistrates who enjoyed the *jus edicendi*, were often considered as constituting a whole, and were styled (when considered as a whole) the *jus honorarium*. For as every office of an elevated character *honoured* or distinguished the person by whom it was occupied, every office of the kind was styled "*honos*." And since the magistrates, who enjoyed and exercised the power of promulging general edicts, enjoyed it by virtue of their *honores*, or of the elevated offices

which they filled, the law which they created by their general edicts was naturally styled jus *honorarium*.

Hence it follows, that the *jus prætorium* was merely a portion of the jus *honorarium*. But as no other portion of the *jus honorarium* was equal in extent and importance to the *jus prætorium*, the term *jus honorarium* is frequently restricted to the latter.

"Prætores (says Pomponius) edicta proponebant: quæ edicta prætorum jus honorarium constituerunt. Honorarium dicitur, quod ab honore prætoris venerat."

"Jus prætorium (says Papinian) et honorarium dicitur: Ad honorem prætorum (*or* ex honore prætorum) sic nominatum."

Materials out of which the *jus prætorium* was formed.

The *jus prætorium* (or the law which the *prætores urbani* introduced by their general edicts) seems to have been made by those distinguished magistrates out of the following materials.

First.) They gave the force of Law (through the *medium* of their general edicts) to various customary or merely moral rules which had obtained generally amongst the Roman people.

Secondly.) They imported into the Roman Law (through the *medium* of their general edicts) much of that *jus gentium*, or that æqual or common Law, which had been formed by the *Prætores Peregrini*, and by the Presidents of the outlying provinces.

Thirdly.) So far as the opinion of the Roman public invited or permitted such changes, they supplied the defects of the *jus civile*, or proper Roman Law, and even abolished portions of it, agreeably to their own notions of public or general utility.—"Jus Prætorium est (says Papinian) quod prætores (supplendi vel corrigendi juris civilis gratiâ) introduxerunt, *propter utilitatem publicam*."

The term Equity. *Æquitas* =

Inasmuch as the body of law, formed by the *Prætores Urbani*, was partly derived from the *jus*

Utilitas, or other approved principle of legislation. *Justitia*, as meaning *utilitas*, or other approved principle, etc.

gentium, and was partly fashioned upon Utility (as conceived by the Prætors and the public), it was naturally styled the *Equity* of the Prætors, or was said to be founded by the Prætors upon *equitable* grounds or principles. For (as I remarked in a former Lecture) the *jus gentium* was styled *jus æquum*, whilst general utility (or principles of legislation supposed to accord with it) was often styled "Æquitas."

It is said in a passage of the Digests (referring to a certain rule of the *jus prætorium*) "hoc *æquitas* suggerit etsi *jure* deficiamur:" That is to say, the rule was commended by general utility (or equity), although it was not recognized by that portion of the Roman Law which was opposed to the *jus prætorium* by the name of "*jus civile*." Though that which conforms to the *jus prætorium* is commonly styled *æquum*, it is frequently styled *justum*. That which does not conform to the *jus prætorium*, is commonly styled "*iniquum*," and not unfrequently, "*injustum*."

Jus Prætorium, an incondite heap of insulated rules.

Inasmuch as the *jus prætorium* grew gradually, or was formed by successive edicts of many successive Prætors, it was not a formal system or digested body of law, but an incondite collection or heap of single and insulated rules. No Prætor thought of legislating systematically: Nor would his stay in office have allowed him to legislate systematically, although the opinion of the public had favoured the attempt, and the supreme or regular legislature had inclined to acquiesce in it. When the Prætor for the time being was struck by a particular defect in the existing law, and when the general opinion invited or provoked him to supply it, he cured that particular defect by a particular provision. And if he thought a particular rule *iniquum* or mischievous, and general opinion favoured or demanded the abolition of it, he inserted a clause in his edict abolishing the specific mischief.

Implication of substantive law, and of substantive prætorian law in particular, with procedure.

* It is also remarkable, that even the substantive law introduced by the Edicts of the Prætors, wore a practical shape, or was implicated with procedure.

If the Prætor gave a right unknown to the *jus civile*, he did not give that right explicitly and directly. He promised or declared, through the medium of his general edict, that, in case any party should be placed in a certain position, he, the Prætor, would give him an action, or would entertain an action if he should think fit to bring one. If the Prætor abolished a rule which was parcel of the *jus civile*, he did not abolish or repeal it formally and explicitly. He promised or declared, through the medium of his general edict, that, in case an attempt should be made to enforce the rule by action, he would empower or permit the defendant to *except* to the plaintiff's action, or to defeat the plaintiff's action, by demurrer or plea. For example; Many conventions or pacts, which were void *jure civili*, were rendered legally binding by the Edicts of the Prætors. But when a Prætor (through the medium of his general edict) gave validity to a convention which was void *jure civili*, he did not determine formally the rights and obligations of the parties. He merely indicated the *action* which he would give to the promisee, in case the promisor should neglect or refuse performance.

Again: According to the *jus civile*, a party *obliged* (by contract or otherwise) was not freed from the performance of the obligation by a simple promise on the part of the obligee, not to enforce it by action. According to the *jus civile*, the obligor was not freed from performance without a formal release (styled *acceptilatio*) executed by the obligee.

Now the Prætors determined, by their general edicts, that the obligation should be extinguished, in case the obligee merely promised that he would not require performance. But instead of abolishing the old law explicitly

* Falck, § 70.

and directly, the Prætors gave to the obligor an *exception* founded on the promise. Instead of declaring explicitly that the obligee had no right, they left him (in appearance) his right of action, but empowered the obligor to defeat that apparent right by a defence bottomed in Equity (or in the *jus prætorium*).

This obscure and absurd mode of abrogating law has also been pursued by our own Chancellors. Where a common-law rule is superseded by a rule of equity, it is left to appearance (or in pretence) unabrogated and untouched. But in case an attempt be made to enforce it by action, the plaintiff is restrained by the Chancellor from pursuing his empty right.

The only difference between the cases arises from this.

In Rome, there was no *distinct* tribunal affecting to administer a distinct system of Law under the name of Equity. Consequently, the equitable defence was submitted to the Prætor himself, or to the very tribunal in which the action was brought.

In England, there *is* a distinct Court affecting to administer a distinct system of Law under the name of Equity. Consequently, the action is brought before one Court, and the defence (in the shape of a suit) is submitted to another. The action is brought in a common-law Court, and in that Court the action is not to be resisted. But the Chancellor (on the application of the defendant) issues an order, restraining the plaintiff at Law from pursuing his legal demand.

In Rome, there was *one* suit. The plaintiff presented his demand (founded on the *jus civile*) to the Prætor; and the defendant submitted his defence (founded on the *jus prætorium*) to the same tribunal.

In England, there are *two* suits. The plaintiff brings his action before a common-law Court; and the defendant institutes a suit before a Court of Equity, for the purpose of obtaining an order to stay the proceedings of his adver-

sary. In England, the mess of complication and absurdity is somewhat thicker than it was in ancient Rome.

To revert to the subject from which I have digressed for a moment; Wherever the Prætor, by his edict, gave a right, he did not give the right directly and explicitly. He merely promised a certain remedy, in case the right, which he gave *in effect*, should be violated or disturbed. And the nature of the right which he thus virtually created, was implied (or described implicitly) in his description of the remedial process.

Actiones Utiles et In factum.

Before I quit this subject, I will advert to two peculiarities of the Roman Law language which are extremely perplexing.

The actions (or rights of action) created by the Prætorian Edict, are frequently styled *utiles*.

It commonly or often happened, that actions given by the *jus prætorium* were *analogous* to actions given by the *jus civile*. Or (speaking more accurately) a case, wherein the Prætor gave an action, was often *analogous* to a case wherein an action had been given by the *jus civile*. Although the case for which the Prætor provided, fell not within the *provision* of the *jus civile*, it fell within the principle upon which that provision was founded. Hence the right of action given by the Prætor was given by way of *analogy*: by way of analogy to a right of action which had already been given by the *jus civile*. And, being given by way of analogy, the action given by the Prætor was styled *utilis*. For the term *utilis* (as taken in this sense) is not derived from *uti* the verb, but is related to *uti* the adverb. The Prætor gave the action, *as* he would have given it, *if* the case, submitted by the applicant, had fallen within the provision of the *jus civile*. An *actio utilis* (as thus understood) may be likened to an *action on the Case*. For an action on the case (or an action of trespass on the case) is properly an action founded on a writ issued in *con-*

simili casu: that is to say, in a case *analogous* to a case for which the ancient law had already provided.

In the language of the Roman Law, *utilis* is often synonymous with "legally valid or operative." But, as applied to prætorian actions, it seems to be synonymous with "analogous." For, since *many* prætorian actions were *really* analogous to actions given by the *jus civile*, prætorian actions were styled *utiles*, even in cases where no such analogy obtained.

Actions given by the Edicts of the Prætors are also frequently styled "actiones in factum," or "actiones in factum conceptæ." A form of expression which seems to have arisen from a peculiarity in the form of procedure. Where an action was founded on the *jus civile*, it would seem that the plaintiff not only stated his case, but alleged or quoted the law upon which he rested his demand. Whence such actions were styled actions *in jus*, or actions *in jus conceptæ*. But where an action was founded on the *jus prætorium*, the plaintiff merely stated the *facts* (or case), without adverting to the *law* which gave him a right to sue. And since the *actor* merely detailed the facts, his action was styled an action *in factum*, or an action *in factum concepta*. The reason of this difference in forms I am not able to explain; nor, perhaps, is it worth explaining. But it *is* of importance that the import of the expression "action *in factum*" should be marked and understood. For, looking at the shape of the expression, it would seem to denote an action allowed by the Prætor *arbitrarily*, rather than an action founded on the *jus prætorium*, or on the settled *Law* which the Prætors had introduced by their edicts.

[Perhaps the term was derived from this: that, where the case was *primæ impressionis*, there was no prætorian law which the plaintiff could allege. And the form was preserved, even in the cases in which an existing prætorian rule might have been cited.]

History of the Prætorian edict from the end of the popular government to the reign of Justinian.

Under the virtual sovereignty of the Emperors or Princes, the Prætors exercised, at least till the reign of Hadrian, the properly legislative powers which they exercised *in liberâ republicâ*, or during the substantial existence of the popular government. But with this difference:

In liberâ republicâ, the Prætors exercised those legislative powers by the express or tacit authority of the *sovereign Roman People:*

After the virtual dissolution of the popular government, the Prætors exercised those legislative powers by the express or tacit authority of the *Emperors or Princes*, who at first were substantially though covertly, and at length were substantially and avowedly, monarchs or autocrators in the Roman World.

Change under Hadrian.

Till the reign of Hadrian, the prætorian law retained the characters which I have just described. It was merely an incondite mass of occasional and insulated rules, that had grown, by a slow and nearly insensible aggregation, through a long succession of ages.

As having been promulged by the Prætor for the time-being (or as being comprised in the edict in force for the time-being), this body of rules was merely *annual*, or was merely calculated to last during his stay in the office. But most of the rules comprised in that present edict had been *translated* or transferred from the edicts of his predecessors. And (of course) most of them would also be translated into the edicts of his successors; and (by virtue of the *re*publications which his successors would give to them) would continue to constitute a large and important portion of the entire Roman Law.

In the reign of Hadrian, the *Jus Prætorium*, or the Prætorian Edict, underwent a considerable change. It was amended or altered by the jurisconsult Julian, and was then promulged, by the command of Hadrian, in the form of a

body of rules proceeding *immediately* from the sovereign. Taking the terms *written* and *unwritten* in their juridical and improper meanings, the *jus prætorium* passed from the department of *unwritten*, into the department of *written* law.

As thus promulged by the command of Hadrian, the *jus prætorium* ought not to have retained the name. For, as thus promulged by the command of Hadrian, it was not properly the law of the Prætors, but was Law proceeding *immediately* from the sovereign legislator: Just as the excerpts from the writings of jurisconsults, of which Justinian's Pandects are mainly composed, are *not* (as constituting the Pandects) the production of the original writers, but are properly the production of the monarch who selected, published, and sanctioned them. But, as chiefly consisting of rules which the Prætors had originally introduced, the *jus prætorium* retained its original *name*, after its *nature* had been changed by Hadrian's promulgation.

Before the change to which I have now adverted, the general edicts of the Prætors were styled "*perpetual*," inasmuch as they consisted of general and prospective rules, and were not issued "*prout res incidit*," or on the spur of specific occasions. They were styled "*perpetual*," as opposed to the *occasional* edicts which the Prætors issued judicially in particular causes.

But the Prætorian Edict, as promulged by the command of Hadrian, was styled "*perpetual*," in another signification of the epithet. As promulged by the command of Hadrian, the prætorian edict was not *edictum annuum*; or it was not calculated to endure to the end of a definite period, and then to cease as Law, unless it should be *re*-published. The Edict amended by Julian, and promulged by Hadrian, was calculated to endure *in perpetuum*, or until it should be abrogated by competent authority.

The Prætorian Legislation after the change under Hadrian.

Whether the Prætors, after this change under Hadrian, continued to legislate *directly* (or to legislate by *general* edicts,) is an agitated and

doubtful question. It would rather appear that Hadrian, in making the change, intended (amongst other objects) to obviate the necessity and demand for the subordinate legislation of the magistracy.

Sources of the law administered by the tribunals, from Alexander Severus to the accession of Justinian.

Whether such *general* edicts were or were not issued, after this change under Hadrian, it is certain that the Prætors ceased to legislate *directly* in the course of the third century.

At or before the close of the third century, the direct legislation of the Prætors, and also the legislation of the *Populus*, *Plebs*, and Senate, had yielded to the avowed legislation of the virtual monarchs or autocrators.

At or before the close of the third century, and from thence to the accession of Justinian, the *living* Roman Law, or the Roman Law *administered and enforced by the tribunals*, was drawn exclusively from the two following sources: namely, the general and special Constitutions of the Emperors or Princes, and the writings of the jurisconsults whose opinions were deemed authoritative.

For though the authors of those writings were not properly *founders* of law, their expositions of principles, and their solutions of specific cases, were equivalent, in effect, to statutes and judicial decisions; since those expositions and solutions guided the tribunals, in all the cases coming before them, for which the Constitutions of the Emperors had not provided.

LECTURE XXXVI.

HAVING sketched the history of the Prætorian Edict to the accession and reign of Justinian, I will notice the effect of its structure on the arrangement of his *Code* and *Pandects*, before I examine the opinions concerning the nature of *Equity* to which I alluded in my last discourse.

The Roman Law, as it was left by Justinian, lies mainly in his Code and Pandects: it having been the intention of their imperial projector, that they should comprise the *whole* of the Roman Law to obtain thereafter in the Empire.

His Institutes are properly a horn-book for the instruction or institution of students; though, since its publication was *subsequent* to the publications of the Code and Pandects, this properly institutional treatise was regarded as a *source of law*, in so far as it conflicted with those two compilations, or in so far as it was concerned with matters for which those two compilations had not provided.

The publications of his Code, Pandects and Institutes, completed the design of the imperial reformer. His Novels, or new Constitutions, were published subsequently; and are merely partial supplements, or partial correctives, to the three compilations embraced by his original project.

Matter of the Code and Pandects.

His Code and Pandects are digests of Roman law *in force at the time of their conception*: His Code being a compilation of imperial constitutions issued by his predecessors and himself; and his Pandects or Digests being a compilation of excerpts from the writings of the jurisconsults whose opinions were deemed authoritative.

There are, indeed, in these two compilations, (though composed of imperial constitutions and excerpts from writings by jurisconsults,) numerous traces of laws established by the *Populus* and *Plebs*, of Consults emanating from the Senate, and of general Edicts issued by the Prætors. For laws of the *populus* and *plebs*, consults of the senate, and general edicts of the prætors, are referred or alluded to in many of the constitutions and excerpts of which these two compilations properly consist.

The *matter*, therefore, of his Code and Pandects, may be conceived and described in the following manner:

His Code is composed partly of *edictal* or *general* constitutions: that is to say, statutes made and promulged by Roman Emperors or Princes, in their quality of sovereign legislators. But it also is composed partly of *special* constitutions: that is to say, judicial decretes (and orders analogous to decretes) issued by Roman Emperors in their quality of sovereign administrators.

His Pandects are composed entirely, or almost entirely, of excerpts from writings by jurisconsults. Some of these excerpts are analogous and equivalent to statutes: being didactic expositions, in general or abstract terms, of laws or principles of law. Others are mere resolutions of specific or particular questions, and therefore are analogous and equivalent to judicial decisions.—Nay, as having been adopted and promulged by Justinian, (who was sovereign in the Roman World,) these general expositions and particular resolutions are properly statutes and judicial decisions; although those characters cannot be properly attributed to them as being the productions of their original authors.

Each, therefore, of these two compilations is a compound of statute and *judiciary* law: being partly a collection of statutes proceeding immediately from a sovereign legislator, and partly a collection of judicial decisions proceeding immediately from a sovereign judge.

Arrangement of the Code and Pandects.

Though the Code is a collection of imperial constitutions, and the Pandects are a collection of excerpts from writings by jurisconsults, the order or arrangement of each of these two compilations is copied from the order of the Perpetual Edict: that is to say, the prætorian edict, (or *chain* of prætorian edicts,) as altered by the jurisconsult Julian, and promulged by the Emperor Hadrian.

This appears from the *Commission*, (to adopt a modern expression,) by which Tribonian, and certain associates, are commanded to select excerpts from the writings of the authoritative jurisconsults, and to place such excerpts in *Pandects* (or in compartments constructed for the reception of them). For in this Commission, (which is prefixed to the Digests or Pandects, and is styled Justinian's Constitution, "*De Conceptione Digestorum*,") he commands Tribonian and his associates to arrange the selected excerpts, "tam secundum *nostri* constitutionem *codicis*, quam edicti perpetui imitationem."

It is probable that the order of the Code and Pandects imitated the order of the Perpetual Edict, for the following reasons or causes.

In the first place; Neither the laws of the *Populus* or *Plebs*, nor the consults of the Senate, nor the constitutions of the Emperors, nor the judicial decisions of the subordinate tribunals, had ever been digested or even collected. Consequently, The order of the Prætorian Edict (which, though it was a shapeless mass of occasional and insulated rules, was, at least, a *collection* of rules), was the only known model for the arrangement of the projected compilations. And, since Tribonian and his associates were uninventive and servile copiers, they naturally ordered the matter of these compilations, according to the solitary pattern which the Edict presented to their imitation.

Like the redactors of the Prussian and French Codes, they *might* have arranged the matter of these compilations,

according to the scientific or systematic method which had been pursued by most of the Classical Jurists who had composed elementary treatises for the instruction of students. But this scientific method had never in fact been observed by any but *institutional writers*. And, consequently, although it was followed by these slavish imitators in the composition of Justinian's *Institutes*, they never thought of pursuing it in the composition of those larger compilations which were destined to embrace the detail of Justinian's legislation.

In the second place; Many of the writings of the jurisconsults whose opinions were deemed authoritative, were running annotations or commentaries on the *jus prætorium*. And the writings of these jurisconsults at, and long before, the accession of Justinian, were perpetually consulted by judges and practising lawyers. And this may have been a reason for arranging the Code and Pandects according to the order of the Prætorian Edict. Their contents (it may have been thought) would be more accessible to judges and practising lawyers, if arranged according to a method with which they were already familiar.

Since the contents of the Code and Pandects were arranged according to the order of the Prætorian Edict, their arrangement has as little pretension to the name of *systematic* as if it were merely alphabetical.

Till the reign of Hadrian, the various rules, comprised by the Prætorian Edict, stood in the order of the respective *times* at which they had been introduced through a long succession of ages. Nor does it appear that Julian, who wrought upon the edict under Hadrian, did anything of much importance towards ordering or arranging its contents. As promulged by Hadrian, the Edict of the Prætors (though considerably altered in its details) seems to have retained its ancient and venerable form (or its ancient and venerated deformity).

The arrangement of the Code and Pandects may therefore be suggested by the following comparison:—Let us imagine that the rules or principles which constitute the Equity of the Chancellors, stood in the order of the times at which they were respectively introduced: That the Law created by Acts of Parliament were digested in that order: That excerpts from the decisions of our various tribunals (and the writings of our authoritative lawyers), were digested in the same order: And that these two digests of our statute and judiciary law, were passed and promulged, by an Act of the Parliament, as the Law to obtain thereafter in England or the United Kingdom.

Now the imagined Digest of our *statute* law would answer *nearly* to Justinian's *Code*. I say "nearly." For many of the imperial constitutions of which that chaos is composed, are not *edictal* or *general* constitutions (or statutes promulged by the Emperors in their legislative capacity), but are decrees issued by the Emperors as judges in the last resort.

The imagined digest of our *judiciary* law would correspond to Justinian's Pandects. But with this difference: That the Pandects consist of excerpts from the writings of authoritative lawyers; whilst the imagined digest in question (though partly consisting of such excerpts) would principally consist of excerpts from the judicial decisions of our tribunals.

Examination of some current and erroneous opinions concerning the *rationale* of the distinction between *strict Law* and *Equity*.

From the foregoing historical sketch of the Prætorian Edict, (and of the effect produced by its form on the forms of the Code and Pandects,) I proceed to a short examination of some current and erroneous opinions concerning the *rationale* of the distinction between *strict Law* and *Equity*. In the course of which examination, I shall briefly compare or contrast the *jus prætorium*, and the *rules of equity introduced by the English Chancellors*.

Examination of the opinion that the distinction of law into law and equity is *necessary* or essential. The distinction is accidental and historical.

It seems to be imagined by many, that the distinction in question is *necessary* or *essential;* or, in other words, that *every* system of positive law is distinguished or distinguishable into Law and Equity. But, in truth, the distinction is confined to the particular systems of *some* particular nations. In every nation, moreover, whose legal system has been distinguished into law and equity, the distinction arose entirely or principally from causes which operated exclusively in that very community. And, accordingly, the equity obtaining in any of the systems to which the distinction is confined, is widely different from the equity obtaining in any of the rest.

The distinction, therefore, is not universal and necessary, but is particular and accidental. And, being particular and accidental, it may be styled an *historical* distinction; since its import is not to be found in the principles of general jurisprudence, but must be gathered from the respective histories of the several systems of law to which it is respectively peculiar.

Is nearly confined to Roman and English Law.

So far is the distinction from being universal and necessary, that I believe it is nearly confined to the Roman and English Law. In most, indeed, of the Anglo-American States, a distinct body of law bearing the name of *equity*, is administered by distinct courts, styled *Courts of Equity*, or is administered, in conjunction with the Common Law, by the ordinary tribunals. But since the law of most of those states is mainly a derivative of the English, it may be said that *equity*, as meaning a portion of positive law, is nearly confined to the Roman and English systems. In other particular systems there is equity, in the other senses to which I shall advert hereafter.

There is equity, (for instance,) as meaning judicial impartiality: equity, as meaning *æquitas legislatoria*, or impartial maxims of legislation: equity, as meaning the *arbitrium*

of the judge: or equity, as meaning the parity or analogy which is the ground of the so-called interpretation *ex ratione legis*. But there is no body of positive law, distinguished by the name of equity, and opposed under that denomination, to other portions of the legal system.

In France, for example, the *arrêts réglementaires*, issued by the ancient parliaments, bore a close resemblance to the edicts of the Roman Prætors. For they were properly statutes, not concerned exclusively with mere procedure or practice, and often annulling or modifying laws proceeding immediately from the sovereign legislature. But the law made by the parliaments through these *arrêts*, never acquired the name of equity; nor was it, I believe, distinguished from the rest of the legal system, by any appropriate denomination. And, in France, there certainly was no equity resembling the body of law which in England has gotten that name. There was no body of law styled "equity," and exclusively administered by extraordinary tribunals styled "Courts of Equity."

Supposition that the direct legislative power exercised by the Prætors was *usurped*, and introduced *per artes*.

By many modern writers, the direct legislative power exercised by the Prætors is considered as *usurped*. It is supposed that the changes, which they wrought in the Roman Law, were introduced *per artes* (or surreptitiously), and were a cheat upon the sovereign legislature.

It is said, for example, by Heineccius, in his excellent Antiquities of the Roman Law;

"Quamvis vero Prætores initio magistratus in leges jurarent: revera tamen leges edictis suis evertebant sub specie æquitatis. Utebantur hanc in rem variis artibus, veluti *fictionibus*; quando, verbi gratiâ, fingebant, rem usucaptam, quæ usucapta haud esset, vel contra, etc."* Now fictions like that which Heineccius here cites (and all the prætorian fictions were equally palpable), could not have deceived any one. The prætorian fictions, therefore, were

* Antiq. Rom. Syntagma. Ed. Haubold. Lib. I. Tit. 2. c. 24.

not *artes*, nor was it the purpose of their authors to introduce their innovations covertly.

When, for example, the Prætor declared by his edict, "that, in certain cases, a thing acquired by usucapion, would be by him considered as not having been so acquired," he abrogated a portion of the *jus civile* relating to usucapion, as avowedly and openly as if he had formally annulled it. And all the fictions by which the Prætors upset the *jus civile*, were just as palpable as that to which I now have adverted. They commonly consisted in feigning or assuming, "that something which obviously *was*, was *not*; or that something which obviously was *not*, *was*." It is ridiculous to suppose that such fictions could deceive, or were intended to deceive. Nay, the very writers who reproach the Prætors with their *artes*, laugh at the grossness of the so-called *lies*, with which (as they imagine) the Prætors accomplished their unholy purposes.

And the remark which I now have made, will apply to the fictions through which our own tribunals have abrogated certain portions of the statute law. Can it be conceited for a moment, by any reasonable person, that fines and recoveries (for example) ever deceived anybody, or were intended to deceive? that the authors of these absurdities hoped to impose upon the nobility whose great estates they were trying to break down? or that heirs in tail, or remaindermen and reversioners, were *trepanned* out of their interests by that ridiculous juggling? Such a conceit is really more absurd than the foolery to which it relates.

It is, indeed, extremely difficult to determine, why subordinate judges, in innovating on existing law, have so often accomplished their object through the medium of fictions. I incline to impute this curious phænomenon to two causes.

1°. A respect on the part of the innovating judges for the law which they virtually changed. By accomplishing the change through a fiction, they rather eluded the existing law, than formally annulled it: they preserved its integrity to appearance, although they broke it in effect.

2°. A wish to conciliate (as far as possible) the friends or lovers of the law which they really annulled. If a prætor, or other subordinate judge, had said openly and avowedly, "I abrogate such a law," or "I make such a law," he might have given offence to the lovers of things ancient, by his direct and arrogant assumption of legislative power. By covering the innovation with a decent lie, he treated the abrogated law with all seemly respect, whilst he knocked it on the head. With regard to their causes and effects, the fictions through which judges innovate on existing law, may be likened to those conventional, and not incommodious lies, through which much of the intercourse of polished society is habitually carried on. If a man, for example, call at your house, and you flatly let him know that you don't wish to see him, you insult him. But if you say, through your servant, "not at home," you intimate just as clearly the same thing, and you let him know your meaning in a respectful and inoffensive manner.

Such (I think) are the causes to which we may impute the fictions through which innovations by judges have been so often accomplished.

For many of the *fictions* (or as some choose to call them, *lies*) by which positive law is so often darkened and disgraced, I cannot account. For they seem to be assumed without necessity, or to answer no purpose.

Such, for example, is the fiction, in our own law, "that husband and wife *are one person*:" Or the fiction, in the older Roman Law, "that the wife is the *daughter* of her *husband*:" Or the fiction, in the Roman law (which Sterne has laughed at in his 'Tristram Shandy'), "that the mother and son *are not of kin*."

The meaning of these several fictions, is merely this: That the parties have certain rights, or lie under certain duties, or certain incapacities. When it is said, for example, "that husband and wife are one person," the meaning merely

is, that they lie under certain incapacities with respect to one another. And where those incapacities do not intervene, the fiction of their unity ceases, and they are deemed *twain*.

When it is said "that the wife is the daughter of the husband," the meaning is merely this:—That, like his sons and daughters, she is subject to his *dominium* or *potestas*: that, like his sons and daughters, she succeeds to him *ab intestato*: and that, succeeding to her husband *ab intestato*, and being to certain purposes a member of his family, she is excluded from succeeding *ab intestato* to members of the family out of which she married.

When it is said "that the mother is not of kin to her son," the meaning is merely this: That she is not related to the son by *agnation*, or through male progenitors: and that, not being related to her son through agnation, she could not succeed to him (*jure civili*) as an *agnat;* though she could succeed to him as his *cognat* by virtue of the prætorian edict which admitted *cognats* to succession.

Why the plain meanings which I now have stated should be obscured by the fictions to which I have just adverted, I cannot conjecture. A wish on the part of the authors of the fictions to render the law as *uncognoscible* as may be, is probably the cause which Mr. Bentham would assign. I judge not, I confess, so uncharitably. I rather impute such fictions to the sheer imbecility (or, if you will, to the active and sportive fancies) of their grave and venerable authors, than to any deliberate design, good or evil.

That the direct legislative power assumed by the Prætors was not *usurped* and was not *assumed covertly*, will also amply appear from the following obvious considerations.

Though it was not assumed, in the beginning, by the direct authority of the sovereign Roman People, it was assumed and exercised, from the beginning, with their tacit approbation. For the law made by the Prætors in the exercise of this legislative power, was made under the eyes of

the people, whose interests it concerned, and who, by an expression of their will, might have abolished it, and called its makers to account. And being statute law, briefly expressed and formally and conspicuously promulged, neither the fact of its enactment, nor the purpose at which it aimed, could have been overlooked or misconceived by the most incurious and the least intelligent.

Add to this, that it was made and promulged under the eyes, and therefore with the approbation, of the Tribunes of the people:* who by their *veto* might have prevented it from taking effect, and forced its authors to recall it.

And though the legislative power exercised by the Prætors was not assumed in the beginning by the direct authority of the people, it afterwards was sanctioned directly by acts of the sovereign legislature. For numberless *leges* of the *populus* and *plebs*, with numberless consults of the senate, assume that the *jus prætorium* is parcel of the Roman law, and accommodate their enactments to its provisions: just as acts of our own parliament are moulded and fashioned on the judge-made law of the tribunals.

The obvious truth is, that in Rome (as in most other communities), powers of legislation, direct and judicial, were assumed and exercised by subordinate judges; at first with the tacit approbation, and in time by the direct authority, of the sovereign legislature.

In almost every community, such has been the incapacity, or such the negligence, of the sovereign legislature, that unless the work of legislation had been performed mainly by subordinate judges, it would not have been performed at all, or would have been performed most ineffectually: with regard to a multitude of most important subjects, the society would have lived without law; and with regard to a multitude of others, the law would have remained in pristine barbarity.

Perceiving this palpable truth, the sovereign legislature,

* Hugo, Gesch. pp. 373, 390.

in almost every community, has permitted and authorized subordinate judges to perform functions which it ought to exercise itself. And till sovereign legislatures are much better constructed than they have been heretofore, this palpable necessity for judge-made law will inevitably continue.

Judge-made law, or law made by subordinate judges, has, therefore, obtained, in almost every community, on account of its obvious utility. But the *jus prætorium* was peculiarly acceptable to the Roman people, on account of the mode in which it was made: because it was *not* judiciary law, imbedded in a heap of particular decisions, but was clear and concise statute law, really serving as a guide of conduct. In the Digests, it is favourably contrasted, for this very reason, with judiciary law: the certainty of the one, being opposed to the comparative uncertainty and *ex post facto* operation of the other.

"Magistratus quoque (says Pomponius) jura reddebant. Et ut scirent cives, quod jus de quâque causâ quisque dicturus esset, *seque præmunirent*, edicta magistratus proponebant: quæ edicta prætorum jus honorarium constituerunt." Lord Coke's redactions (if authorized) would have strongly resembled Prætorian Edicts, and been statute: for law given in general formulæ is statute law.

[*v.v.* Much to be regretted, that the law made by the English tribunals, has not been made by direct or statute, and not by judicial or indirect legislation. We might have had a systematic and compact body of law really deserving the name of a code: for there is no necessary connexion between codification and supreme legislation.

v.v. Instead of blaming (with Junius and other declaimers) Lord Mansfield and other enterprising judges for largely innovating on the law, I only lament that the Courts did not assume openly legislative power.

v.v. Could have been no danger of abuse in such open and direct legislation, though there is, in the covert and piecemeal legislation to which "*constitutional jealousy*" has forced them.

This same constitutional jealousy is always perverse and absurd. It is always straining at gnats, and swallowing camels. (*e. g.* Police, Army.)

v. v. Strange inconsistency of Hugo and others, who are at once enemies of codification, (or rather lovers of judiciary law formed by decisions upon customs,) and, at the same time, historians and admirers of the Roman Law. As lovers of customary law, they depreciate statute law generally, and especially abhor codes, or compact and systematic bodies of law. As historians and admirers of the Roman Law, they insist (and justly insist) on those excellencies of the *jus prætorium* which I have briefly stated or suggested. They do not perceive that those excellencies belong to it *as being a faint approach to a code:* and that they belong to a well-made code in a degree incomparably higher.]

[Defective constitution of legislature (where a numerous body).

Changes in state of society, which, owing to such constitution, etc., are not provided for by requisite changes and adaptations of the law.*

Fictions.†

Causes of the incompleteness of Written Law in all countries: And comparative merits of the various substitutes for direct and supreme legislation.

v. v. Incapacity of hereditary monarchs for the business of legislation.

v. v. Incapacity of legislatures consisting of numerous bodies. Business of legislation ought to be performed by persons who are at once thoroughly versed in the sciences of jurisprudence and legislation, and in the particular system of the given community: The sovereign legislature merely authorizing and checking, and not affecting to legislate itself.

v. v. Peculiar incapacity of bodies. *A fortiori,* applicable to such bodies as the Roman *populus* and *plebs.*]

* Hugo, Gesch. p. 501.

† Hugo, Gesch. pp. 391, 583.
Savigny, Vom Beruf, etc., p. 32.
Hugo, Enc. pp. 19 to 28.

LECTURE XXXVII.

Subjects of Lecture.

In the following discourse, I shall call your attention to a few of the numerous differences which distinguish *statute law* (or law made by direct, or proper legislation) from *judiciary law* (or law made by judicial, or improper legislation). And having stated or suggested a few of those numerous differences, I shall remark upon the advantages and disadvantages of judicial or improper legislation, and the possibility of excluding that prevalent mode of legislation, by means of *codes*, or *systems of statute law*.

I would briefly remark, before I proceed to the former subject, that I do not mean exclusively, by the term "statute law," statute law made directly by sovereign or supreme legislatures: and that I do not mean exclusively, by the term "judiciary law," judiciary law made directly by subordinate judges or tribunals. As I have shewn sufficiently in preceding lectures, there is no necessary connection between *direct* and *supreme*, or between *judicial* and *subordinate* legislation. Statute law may proceed directly from subject, or subordinate authors: whilst a monarch or supreme body may exercise the judicial powers inhering necessarily in the Sovereign, and therefore may be directly the author of law made in the judicial manner.

By the opposed expressions "statute law" and "judiciary law," I point at a difference (not between the *sources* from which law proceeds, but) between the *modes* in which it begins. By the term "statute law," I mean any law (whether it proceed from a subordinate, or from a sovereign

source) which is made directly, or in the way of proper legislation. By the term "judiciary law," I mean any law (whether it proceed from a sovereign, or a subordinate source) which is made indirectly, or in the way of judicial or improper legislation.

Having premised this explanation, I call your attention to a few of the numerous differences which distinguish *statute* from *judiciary* law.

The principal or leading difference between statute and judiciary law.

The principal or leading difference between those kinds of law, is, I apprehend, the following: A law made judicially, is made on the occasion of a judicial decision. The direct or proper purpose of its immediate author is, the decision of the specific case to which the rule is applied, and not the establishment of the rule. Inasmuch as the grounds of the decision may serve as grounds of decision in future and similar cases, its author legislates substantially or in effect: And his decision is commonly determined (not only by a consideration of the case before him, but) by a consideration of the effect which the grounds of his decision may produce as a general law or rule. He knows that similar cases may be decided in a similar manner; and that the principles or grounds of his decision may therefore be a *law* by which the members of the community may be bound to guide their conduct.—But, this notwithstanding, his direct and proper purpose is not the establishment of the rule, but the decision of the specific case to which he applies it. He legislates *as properly judging*, and not *as properly legislating*.

But a statute law, or a law made in the way of direct legislation, is made solely, and is made professedly, *as* a law or rule. It is not the instrument or mean of deciding a specific case, but is intended solely to serve as a rule of conduct, and therefore to guide the tribunals in their decisions upon classes of cases.

The principal difference, therefore, between statute and judiciary law, lies in a difference between the forms in which they are respectively *expressed.*

The principal difference between statute and judiciary law lies in a difference between the forms in which they are respectively expressed.

A statute law is expressed in general or abstract terms, or wears the form or shape of a law or rule.

A law (or rule of law) made by judicial decisions, exists nowhere in a general or abstract form. Before it can be known, it must be gathered from the grounds or reasons of the specific decision or decisions by which it was virtually established. It therefore is implicated with the peculiarities of the specific case or cases, to the adjudication or decision of which it was applied by the tribunals. In order that its import may be correctly ascertained, the peculiar circumstances of the cases to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. For those general propositions being thrown out by the tribunals with a view to the decision of a specific case, they must be taken in conjunction with, and must be limited by, the specific or individual peculiarities by which that case was distinguished. Such general propositions, occurring in the course of a decision, as have not this implication with the specific peculiarities of the case, are commonly styled extra-judicial, and commonly have no authority.

[*v. v.* Difficulty of stating the general effect of a judicial decision.

Marginal abstracts in reports of cases.

A reporter who understands his business, merely gives the facts and the decision; and leaves his readers to extract the general principles upon which the decision proceeds.]

In short, although a rule or principle is established by the decision or decisions, and is applicable and actually applied to subsequent and resembling cases, that rule or principle lies *in concreto,* and must be gotten from the decisions

by which it was established through a process of abstraction and induction. Before we can find the import of the general principle or rule, we must exclude the peculiarities of the cases to which it was applied, and must consider the decision to which the tribunal would have come, if its decision had not been modified by those specific differences.

Looking at the *general reasons* alleged by the Court for its decisions, and *abstracting those reasons from the modifications which were suggested by the peculiarities of the cases*, we arrive at a *ground* or *principle* of decision, which will apply universally to cases of a class, and which, like a statute law, may serve as a rule of conduct.

But without this process of abstraction, no judicial decision can serve as a guide of conduct, or can be applied to the solution of subsequent cases. For as every case has features of its own, and as every judicial decision is a decision on a specific case, a judicial decision *as a whole*, (or as considered *in concreto*,) can have no application to another and, therefore, a different case.

An enormous fault of the Pandects and Code, considered as a *Code*.

And here I will remark (before I proceed further) an enormous fault of Justinian's Pandects and Code, considered as a *code* (in the modern acceptation of the term:) that is to say, as a body of general rules.

Though much of his Code consists of edictal or general Constitutions, (which, as I have stated already, are statute laws,) much of it consists of constitutions which are special or particular: that is to say, which are judicial decisions of the Roman Emperors as the supreme judicatory of the empire, and not, like the edictal constitutions of the same emperors, general laws or rules.

Consequently, his Code is a compilation of statutes, and of judicial decisions: a heterogeneous mass of objects having no other relation, than that they are all of them *Imperial Constitutions:* that is to say, statutes and other orders ema-

nating from the Emperors directly, and not emanating directly from subordinate legislatures or tribunals.

His Pandects (as I stated in my last Lecture) consist mainly of excerpts or fragments from the writings of celebrated and authoritative jurisconsults. But most of those writings were *casuistical*, or consisted of opinions of the writers on specific or particular cases. They consisted of applications of actual law to specific cases; or of applications to specific cases, of law *anticipated* by the writers: that is to say, of law, which (in the opinion of the writers) the tribunals would probably emit, in the event of the cases in question coming under judicial cognizance.

Most of those writings, therefore, were closely analogous to compilations of judicial decisions: The only difference being, that judicial decisions are opinions pronounced by sovereign authority, whilst the decisions or opinions, which were contained in those writings of jurisconsults, were decisions or opinions on particular cases, emitted by private or unauthorized persons. [But were rendered law by Justinian's sanction: *i. e.* tantamount to judicial decisions.]

Some of the writings of jurisconsults, from which excerpts are inserted in the Pandects, were undoubtedly didactic: that is to say, they consisted of expositions, in general terms, of the Roman law. And, by consequence, they are more analogous to statutes than to judicial decisions. [And were rendered such, through Justinian's ordination and promulgation.] They consist of expositions of law in abstract or general terms, as statutes consist of commands conceived in similar expressions. The difference between those writings, and statutes or legislative enactments, mainly consists in this: that statutes are general rules set by sovereign authority; whilst the writings in question (though conceived in general expressions) were merely expositions of law by private or unauthorized lawyers.

The literal meaning of the words in which a statute is

expressed (or their grammatical, customary, or obvious meaning) is the primary index to the sense which the author of the statute annexed to them: Or, (changing the phrase,) it is the primary index to the intention with which the statute was made, or the primary index to the law which the legislature intended to establish. But the interpreter regarding and consulting the literal meaning of the words, may find that the intention which the legislature held is indeterminate and dubious: that is to say, he may not be able to discover in the literal meaning of the words, any determinate purpose that the legislature may have entertained. Now, if he cannot discover in the literal meaning of the words, any such definite and possible purpose, he may seek in other *indicia*, the intention which the legislature held: He may seek it, for example, in the reason of the statute, as indicated by the statute itself; or in the reason of the statute, as indicated by the history of the statute; or in the clear enactments of other statutes made by the same legislature *in pari materiâ*.

But if he be able to discover in the literal meaning of the words, any such definite and possible purpose, he commonly ought to abide by the literal meaning of the words, though it vary from the other indices to the actual intention of the legislature. Or, (changing the phrase,) though the literal meaning of the words vary from the other *indicia*, he commonly should take the intention which their literal meaning may point at, as and for the intention with which the statute was made. For by reason of the abstract form which is given to a statute law, the very words of the statute are almost parcel of the statute. The terms through which the legislature tried to convey its intention, were probably measured as carefully as the intention which it tried to convey. And the interpreter ought to infer, (unless the contrary manifestly appear,) that it employed them with the obvious meaning which custom has annexed to them, and not with a sense which is unusual, and therefore recondite and obscure.

If the literal meaning of the words were not the primary index, (or were not scrupulously regarded by the interpreter,) all the advantages (real or supposed) of statute legislation would be lost. For the purpose is, to give an index more compendious, compact, (or lying together,) and therefore less fallible, than is that to a judiciary rule. But if the interpreter might, *ad libitum*, desert the literal meaning, no such index could be given.

In the case, therefore, of a statute, the primary index to the law which the lawgiver intended to establish, is the grammatical sense of the words in which the statute is expressed. But the primary index to a rule created by a judicial decision, is not the grammatical sense of the very words or terms in which the judicial decision was pronounced by the legislating judge: And, *a fortiori*, it is not the grammatical sense of the very words or terms in which the legislating judge uttered his general propositions. As taken apart (or by themselves), and as taken with their literal meaning, the terms of his entire decision (and, *a fortiori*, the terms of his general propositions) are scarcely a clue to the rule which his decision implies. In order to an induction of the rule which his decision implies, their literal meaning should be modified by the other indices to the rule, from the very commencement of the process. From the very beginning of our endeavour to extricate the implicated rule, we should construe or interpret the terms of his entire decision and discourse, by the nature of the case which he decided; and we should construe or interpret the terms of his general or abstract propositions, by the various specific peculiarities which the decision and case must comprise. For it is likely that the terms of his decision were not very scrupulously measured, or were far less carefully measured than those of a statute; insomuch that the reasons for his decision, which their literal meaning may indicate, probably tally imperfectly with the reasons upon which it was founded. And his general propositions are imperti-

nent, and ought to have no authority, unless they be imported necessarily (and therefore were provoked naturally) by his judicial decision of the very case before him.*

Most, however, of the writings of jurisconsults (of excerpts from which the Pandects are composed), are rather opinions on specific cases, than expositions (in abstract terms) of the Roman Law.

A large portion of the Code, and a larger portion of the Pandects, consists not of general rules, (or of statute laws,) but of judicial decisions, (or of opinions analogous to such decisions,) from which rules must be gathered by a process of abstraction and induction.

And, what is worse, the portion of the Code and Pandects which consists of such decisions and opinions, is constructed with so little reflection and so little skill, that the general reasons or principles which were the bases of the decisions and opinions are often extremely uncertain.

As I have stated already, the general propositions which occur in a judicial decision, must always be taken with reference to the specific peculiarities of the case. For, as the proper purpose of the judge is the decision of the specific case, any general proposition which does not properly concern it, is extra-judicial and unauthoritative. And (moreover) as the judge is not (like the legislator) occupied in constructing a rule, his general propositions are often crudely expressed, and must be carefully construed by a constant reference to his direct and proper purpose. Any of his general propositions, taken by itself, is commonly broader or narrower than the intention which he really entertains. The inaccurate expressions in which it is conveyed, must, therefore, be enlarged or restricted by the scope of his entire discourse. And the scope of his entire discourse cannot

* Nor is it necessary, that the general grounds should be expressed by the judge. In which case, the only index is, the specialities of the decision as construed (or receiving light) from the nature or class of the case. An inference *ex rei naturâ*.—See *Thibaut* and *Mühlenbruch*.

be known with assurance, unless the case which he decides is known in all its detail.

But, for the sake of conciseness, or for the sake of getting at propositions of an abstract or general form, the facts of the cases contained in the Code and Pandects are often suppressed by the compilers. The general propositions contained in the special Constitutions, (or contained in the analogous opinions of the jurisprudential writers,) are detached from the facts to which they were applied, and which are requisite guides to their exact import.

Consequently, before we can arrive at their exact import, we must perform a double process. From the remaining fragments of the particular case to which a proposition of the kind was applied by the judge or jurisconsult, we must gather the residue of that specific case. And having thus conjectured the subject of the decision or opinion, we must collect the import of the proposition, (as a general principle or rule,) by the process of abstraction and induction to which I have already adverted.

Conceive a general proposition of my Lord Eldon, detached from the case in which it occurs, and from the careful limitations (suggested by the peculiarities of the case) with which the proposition is guarded.

Now a collection of propositions so detached, (and of which the exact import must therefore be extremely uncertain,) will afford a conception of most or much of the matter, which Tribonian and his associates inserted in the Code and Pandects, as the future law of the Roman Empire.

Ratio legis et ratio decidendi.

It follows from what has preceded, that law made judicially must be found in the general *grounds* (or must be found in the general *reasons*) of judicial decisions or resolutions of specific or particular cases: that is to say, in such *grounds*, or such *reasons*, as detached or abstracted from the specific peculiarities of the decided or resolved cases. Since no two cases are precisely alike, the

decision of a specific case may partly turn upon reasons which are suggested to the judge by its specific peculiarities or differences. And that part of the decision which turns on those differences, (or that part of the decision which consists of those special reasons,) cannot serve as a *precedent* for subsequent decisions, and cannot serve as a rule or guide of conduct.

The general reasons or principles of a judicial decision (as thus abstracted from any peculiarities of the case) are commonly styled, by writers on jurisprudence, the *ratio decidendi*. And this *ratio decidendi* must be carefully distinguished from that, which is commonly called *ratio legis*. The latter is the end or purpose which moved the legislator to establish a statute law. Or it is the end or purpose of any of its particular provisions: an end or purpose which is subordinate to the general design of the statute.

Ratio decidendi is itself a *law:* or, at least, it is the general ground or principle of a judicial decision or decisions. For want of a statute law, it performs the functions of a general rule, or of a guide of conduct. Though not a rule in form, it is tantamount to a general command proceeding from the sovereign or state, or from any of its authorized subordinates. For, since it is its known will that the general reason of a decision on a particular or specific case shall govern decisions on future resembling cases, the subjects receive from the state (on the occasion of such a decision) an expression or intimation of its sovereign will, that they shall shape their conduct to the reason or principle thereof.

And here I will briefly remark, that, when I speak of a rule made by a judicial decision, I mean, of course, such a judicial decision as is not a mere application of previously existing law. By such a judicial decision, as is merely an application of previously existing law, no rule is made. In such a decision, the *ratio decidendi* is the general ground of the decision which the judge applied to the given case:

that is to say, the general ground of decision is either some statute law, or else the general ground of some anterior decision by which a new rule had been already introduced and created. In every judicial decision by which law is made, the *ratio decidendi* is a *new* ground or principle, or a ground or principle *not previously law.*

The interpretation or construction of statute law, and the *peculiar* process of abstraction and induction, etc.

It appears, then, from what has foregone, that *ratio decidendi* (or the ground or principle of a judicial decision which is not merely an application of pre-existing law) is itself a law, or performs the functions of a law.

But *ratio legis* is not a law; nor does it perform, in any respect, the functions of a law. It is the general and paramount cause of a *statute* law, (or else the particular and subordinate reason of any of its particular and subordinate provisions.) The rule to be observed by the governed is not the *ratio legis*, but the *lex ipsa*. The rule to be observed by the governed must be collected from the *terms* wherein the statute is expressed: though, to the end of ascertaining the meaning annexed to those terms by the legislator, the *ratio legis* (as a mean or instrument of interpretation or construction) must commonly be consulted by the judges who apply the statute judicially, and by all who would shape their conduct to the provisions of the statute.

Hence it follows, that the interpretation or construction of a statute law widely differs from the analogous process of induction, by which a rule made judicially is collected from decided cases.

Since a statute law is expressed in determinate expressions, and those expressions were intended to convey the will of the legislator, it follows that the import or meaning which he annexed to those *very* expressions is the object of *genuine* interpretation. If those terms be of doubtful import, the *ratio* or scope of the statute (or even the history of the statute) may be used as an instrument or mean for

determining the doubtful import. But if those terms be not doubtful, the certain sense of those terms must be followed by the judge, although it may conflict with the scope of the statute as collected from other *indicia*.

Ratio legis is, as I have said, the scope or determining cause, of a statute law: that is to say, the end or purpose which determines the lawgiver to make it, as distinguished from the intention or purpose *with which* he actually makes it. For the intention which is present to his mind when he is constructing the statute, may chance to differ from the end which moves him to establish the statute. Although he conceive that intention with perfect clearness and precision, and although he express it in the statute with similar clearness and precision, he may not pursue the scope, nor adhere to the principle, of the statute with perfect completeness and consistency. Consequently, notwithstanding the clearness and the precision with which he conceives and expresses his actual intention or purpose, the statute may be fitted imperfectly to accomplish the end or purpose by which he is determined to make it. And hence the spurious interpretation, *ex ratione legis*, through which a statute unequivocally worded by the lawgiver, is extended or restricted by the judge.

By such extensive or restrictive interpretation the judge may depart from the manifest sense of a statute, in order that he may carry into effect its *ratio* or scope. But, in these cases, he is not a *judge* properly interpreting the law, but a subordinate *legislator* correcting its errors or defects. He supposes the expressions which the lawgiver *would* have used, (or he supposes the provisions which the lawgiver *would* have made,) if the latter had expressed his intention in appropriate terms, (or had pursued the scope of the statute in a consistent manner:) And those supposed expressions, or those supposed provisions, he *substitutes* for the clear expressions which the lawgiver has actually used, or for the provisions which the lawgiver has indisputably made. This,

however, is not *interpretation*, but a process of legislative amendment, or a process of legislative correction, which lays all statute law at the arbitrary disposition of the tribunals.

In the process of interpretation (properly so called), the purpose, therefore, is to get at the meaning of the expressions in which the legislator has attempted to convey his intention. For, owing to the abstract form of a statute law, the very terms in which it is expressed are necessarily the main index to the legislator's purpose.

But in the analogous process of induction, by which a rule of law is extracted from judicial decisions, that scrupulous attention to the language used by the legislating judge would commonly defeat the end for which the process is performed. As the general propositions which the decision contains are not commonly expressed with much premeditation, and as they must be taken in connection with all the peculiarities of the case, it follows that the very terms in which those propositions are clothed are not the main index to the *ratio decidendi*;—to the general rule or principle which that decision established, and which is the governing principle of the case awaiting solution.

In short, a statute law is expressed in general or abstract terms which are *parcel* of the law itself. And, consequently, the proper end of interpretation is the discovery of the meaning which was actually annexed by the legislator to those very expressions. For if judges could depart *ad libitum* from the meaning of those expressions, and collect the provisions of the statute from other *indicia*, they would desert (generally speaking) a more certain, for a less certain guide.

But a rule of law established by judicial decision, exists nowhere in precise expressions, or in expressions which are *parcel* of the *ratio decidendi*. The terms or expressions employed by the judicial legislator, are rather faint traces from which the principle may be conjectured, than a guide to be followed inflexibly in case their obvious meaning be perfectly certain.

Broad as the distinction is between the interpretation of statute law and the analogous process of induction by which a rule is extracted from a judicial decision or decisions, the two distinct processes have commonly been confounded by those who have written on the interpretation of the Roman law.

As I have remarked above, a part of Justinian's Code consists of *edictal* Constitutions, or of proper or statute laws made and promulged by the Emperors as legislators. But a part of it consists of *special* Constitutions; that is to say, of judicial decisions by the Emperors as the supreme judges of the Empire: whilst the Pandects consist of excerpts from the writings of jurists, which not uncommonly are solutions of cases, and closely analogous to judicial decisions.

[Owing to the sanction imparted to them by the Emperor, they are substantially judicial decisions.]

Now most of the modern Civilians who have treated of interpretation, have applied to the *statute law* contained in Justinian's compilations, and to the *decisions* and *casuistical solutions* which the compilations also comprise, the *same* rules of interpretation or construction.

For example: They have confounded *extensive* interpretation of statute law with the application of a decided case to a resembling case.

The so-called *extensive* interpretation of statute law *ex ratione legis*, is the extension of the provisions of the law to a case which they do not comprise, because the case falls within the scope of the law although the provisions of the law do not include it. There is truly an *extension* of the law.

But the application of a decided case to the solution of a similar case, is the *direct application* of the judiciary law itself, and not the *extension* of the law agreeably to its reason or scope. For, here, the law cannot be extended agreeably to the reason of the decision, inasmuch as the reason of the decision (or the ground or principle of the

decision) is itself the law. The application, therefore, of a decided case to the solution of a resembling case, is the *direct subsumption* of a case to which the law itself directly applies, and not the extension of a law *ex ratione ejus* to a case or *species obveniens* which the law does not embrace.

[*v. v.* The way in which they have confounded their subject, from not perceiving the distinction to which I have now adverted.

"Ampliant istam regulam ut tum maxime procedat *si ratio in lege* sit expressa;* tunc enim non est *extensio* sed potius *comprehensio.* Habetur enim ratio in lege expressa pro lege generali."†

Again: One of their rules of interpretation is, "*cessante ratione legis, cessat lex ipsa.*"]

Now admitting that this rule will apply to a *præjudicium* or precedent, it cannot apply to a statute law. For, in a statute law, the law is one thing, and the reason of the law is another thing. And, consequently, the law (considered as a command) may well continue to exist, though the reason leading to its creation may have ceased.

Mr. Thibaut of Heidelberg (in his Interpretation of the Roman Law) was the first (I believe) who saw distinctly, that the rules of interpretation which will apply to the edictal Constitutions contained in Justinian's compilations, have little or no applicability to those judicial decisions (or to those solutions of cases that are analogous to judicial decisions) which the same compilations also embrace.

[*v. v.* It is much to be regretted that Thibaut's treatise on interpretation is not a treatise on interpretation generally, but a treatise on the interpretation of the Roman Law: which, on account of the strong peculiarities of Justinian's compilations, has often little connection with the general principles of construction.

Did not see that the distinction between interpretation etc. is not peculiar to the Roman Law.]

* Decided *case* resting upon a *ground* which (whether it be expressed or not in the case) is in truth the *Law.—Marginal Note.*

† B. Forster, de Juris Interpretatione, lib. ii. c. 2, quoted by Thibaut, Theorie der logischen Auslegung des römischen Rechts, p. 67.

Competition of analogies: —Paley and Romilly.

As being connected with the subject which I am now considering, I will advert to an oversight of Sir Samuel Romilly, in his admirable article in the Edinburgh Review, on Mr. Bentham's papers relative to Codification.

The passage is as follows:

"It is very extraordinary, that, with such accurate notions as Paley appears to have had on this subject, he should not have seen, that this 'Source of disputation,' as he calls it, was peculiar to an unwritten law. He strangely supposes it to belong equally to the Statute as to the Common Law. 'After all the certainty and rest,' he says, 'that can be given to points of law, either by the interposition of the Legislature, or the authority of precedents, one principal source of disputation, and into which, indeed, the greater part of legal controversies may be resolved, will remain still, namely, the competition of opposite analogies.' Difficulties undoubtedly often arise in the application of written statutes, and Paley himself has well pointed them out; but they are quite of a different nature from those which attend the administration of the common law, and certainly cannot be surmounted by that competition of opposite analogies which he mentions."*

Now it seems to me, that "the competition of opposite analogies" (if the phrase mean anything) is just as likely to arise on the application of statute law, as on the application of judiciary law. Paley must be speaking, (if he mean anything,) not of the discovery of the law by interpretation or other induction, but of the application of the law, as already ascertained, to the case which awaits solution.

With regard to the process of interpretation, or the analogous process of induction which I have already described, the phrase "competition of analogies" has no meaning. The purpose (in the case of the induction) is to deduce the rule of law from the decided case or cases by which the

* Edin. Rev. vol. xxix. p. 224.

rule was established. If the rule of law was established by *one* decided case, the rule cannot have been founded on opposite analogies. If it was established by several cases, it was founded on the resembling, and not on the differing properties of those several cases: so that here also, it was not founded on *opposite*, but on *analogous* analogies.

But with regard to the application of the law to the case awaiting solution, "the competition of opposite analogies" may certainly arise. For the case awaiting solution may resemble in some of its points the case or cases to which the rule of law has actually been applied. But it may also resemble in other of its points a case or cases from which the application of the law has been withheld. Now, with reference to the rule of law, (or with reference to the applicability of the rule to the case which awaits solution,) the resemblances of the case to the cases to which the law has been applied, and the resemblances of the case to the cases from which the law has been withheld, are "opposite and competing analogies:" the first inviting the tribunal to apply the rule; the second admonishing the tribunal that the rule is not applicable.

But this is not peculiar (as Sir S. Romilly supposes) to judiciary law. Wherever law of any kind is to be *applied*, this "competition of opposite analogies" may embarrass and vex the tribunal.

[The matter contained in the following four pages formed no part of the Lectures. It was found among loose papers.—*S. A.*]

Where there is no rule in the system applicable to the case, the judge virtually makes one, if he decides at all, or decides on any general ground.

Now where the judge makes a judiciary rule, he may build it on any of various grounds, or derive it from any of various sources: *e.g.* a custom not having force of law, but

obtaining throughout the community, or in some class of it; a maxim of international law; his own views of what law ought to be (be the standard which he assumes, general utility or any other).

[All which I will shortly explain elsewhere.]

But it often (perhaps, most commonly) happens, that he derives the new rule, by a consequence built on analogy, from a rule or rules actually part of the system. And it is to the creation of law thus derived from pre-existing law, that the competition of opposite analogies to which judicial legislation is liable, is peculiarly, if not exclusively, incident.

Law thus derived from pre-existing law, has received various names. It is styled by Hale, law formed by illations on anterior law:* by others, law derived from pre-existing law, by consequence or analogy: by others, jus quod ex jure efficitur *argumentando*.† By others it is styled law built upon technical grounds: *i.e.* upon grounds like those of the rules from which it is derived, rather than on considerations of utility which regard the actual state of the community.

How law thus derived from anterior law is formed.

The judge makes, and applies to the subjects wanting a rule, a rule analogous to an existing rule (statute or judiciary) which regards analogous subjects. *E.g.*: The extension of a statute unequivocally expressed, to cases embraced by its scope, but omitted by the lawgiver: or its extension to subjects not existing when it was made, but analogous to subjects embraced by its provisions or scope. Or, (supposing that promissory notes preceded bills of exchange,) the rules applicable to the latter were formed by consequence and analogy from rules regarding the former.

In every case, therefore, the new rule thus derived is applied to some species or sort of a given genus or kind.

But the rule may be derived from a rule regarding generally the whole *genus*, or from a rule regarding specially.

* Hale, p. 90. † Mühlenbruch, Vol. I. L. I. § 42.

some of its species. *E. g.*: A new rule regarding contracts of a species or sort, may be derived from a rule regarding contracts generally, or from a rule regarding specially some other species of contracts. Considering the way in which law is gradually built out, the latter is the more ordinary process.

In either case, the new rule is derived from the pre-existing rule by consequence and analogy, or rather by a consequence founded on analogy. For the new rule is made what it is, *in consequence* of the existence of a similar rule applying to subjects which are *analogous* to (or of the same genus with) the subjects which itself particularly concerns.

There is, in every case, a consequence, an analogy, and a difference.

The new rule is formed by consequence from the anterior rule. The subjects of the new rule are analogous to those of the old one. But, by reason of the specific difference of the species or sort which its peculiar subjects belong to, the new rule is different from, as well as like, the old one.

However, where the new rule is formed from an old rule regarding the genus generally, the new rule is not co-ordinate with the old one, but is included under it, as the minor of a syllogism is included under the major. But where the new rule is derived from an old rule specially regarding a species or sort, the new rule is merely co-ordinate with the old, and is not included in it as a consequence.

And hence probably the difference between rules formed by consequence, and rules formed by analogy.

[*Sed quære.* For, if there were merely a consequence, in the case of the generic rule, there would not be a new rule, but merely a subsumption of the new species under the old one.]

How the competion of opposite analogies may arise.

Subjects calling for a rule, may be like, in some respects, to subjects of anterior rule A; but, in other respects, to subjects of anterior rule B, which is essentially different from A.

The two likenesses are competing analogies. One inviting the judge to model the rule in projection on A; and the other inviting him to model it on B: One inviting him to decide the case analogously (but not exactly similarly) to decisions by A; and the other, etc.

Q. Whether difficulties may not arise from inconsistency of competing rules?

This is the competition specially contemplated by Paley.—He supposes a question which *can only be brought within any fixed rule by analogy: i. e.* which ought to be decided by a rule analogous to a fixed or existing rule. For, if the case were *brought within a fixed rule*, it would be directly subsumed under that rule, and the difficulty would not exist. He commits the usual mistake of supposing that a rule can be extended. Like the mistake, of supposing that the judge extends a statute, when he ekes it out by a judiciary rule.

It has been supposed by Sir Samuel Romilly that the competition of opposite analogies could not arise, if the system of law were entirely statute (codified or not).

Now with regard to that competition which is incident to *the application of law*, it is manifestly incident to statute law. For statutes may be inconsistent *inter se*, or a single statute may be inconsistent with itself. Nor is direct legislation, more than judicial, free from a competition of analogies. For a statute, like a judiciary rule, is often derived, by a consequence founded on analogy, from an anterior statute or an anterior judiciary rule.

A remarkable example of this is furnished by the legislation of the Prætors, by whom most of the working civil law was formed. Now though they legislated directly, (or by way of what the French would call *arrêts généraux et réglementaires*,) they legislated, commonly, agreeably to the maxim which has guided the judicial legislation of our own Chancellors; "*Æquitas sequitur legem*:* That is to say, the law which they made, was made by consequence and analogy to the *jus civile* or common law; much more than

* Dig. L. 22, tit. 5; de Testibus: Frag. 14.

in pursuance of their own views of public utility. Though this last was consulted too, or their *æquitas* would have been nugatory.

Nothing, indeed, can be more natural, than that legislators, direct or judicial, (especially if they be narrow-minded, timid, and unskilful,) should lean as much as they can on the examples set by their predecessors. The internal history of almost every system of law, consists mainly in tracing the course wherein the system was formed by successive illations.

Sir Samuel Romilly supposes that the competition of opposite analogies is a means of surmounting the difficulty. It is, in truth, the difficulty to be surmounted. He falls into the mistake of confounding the competition incident to the application, with the competition incident to the creation, of law. This arose from his assuming unconsciously at the moment (against what he had shown in the text) that common or judiciary law, when virtually made, is only administered or applied.

[*v. v.* Veneration for Sir Samuel. Have ventured and shall venture to criticize, for that very reason; veneration by no means tending to acquiescence in errors. Excellence of his article. Mistakes inevitably arose from the pressure of practice on his mind, which is inconsistent with the thorough abstraction that disquisitions of a general nature require.]

Blackstone's remark concerning the decretes of the Roman Emperors.*

As being connected with the subject which I am now considering, I will advert to a foolish remark of Sir William Blackstone concerning the judicial decretes of the Roman Emperors.

He tells us that these decretes, "contrary to all true forms of reasoning, argue from particulars to generals."

The truth is, that an imperial decrete of the kind to which Blackstone alludes, is a judicial decision establishing a new

* Vol. I. p. 59.

principle. Consequently, the application of the new principle to the case wherein it is established, is not the decision of a general by a particular, but the decision of a particular by a general. If he had said that the principle applied, is a new principle, and, therefore, an *ex post facto* law with reference to that case, he would say truly. But the same objection (it is quite manifest) applies to our own precedents.

[*v. v.* The reason of his not perceiving this, the fiction about judges *declaring* law.

Confounds the *establishment* with the *application* of general rules.]

Before I proceed to the advantages and disadvantages of judicial legislation, and to the question of codification, I will make a few remarks upon certain topics on which I may touch conveniently at the present point of my Course.

As I observed in former Lectures, judiciary law is suggested by various causes, and often takes from these various causes, various names. With reference to its suggesting causes, it consists mainly:

1°. Of Rules which have grown up by custom or usage, and which become Law by judicial adoption.

Of Rules which are formed from these by consequence or analogy.* To law formed in this manner the term "Customary Law" is commonly confined.

2°. Rules which are established by judges *ex proprio arbitrio: i.e.* according to their own notions of what *ought* to be Law: whether the standard be utility or any other.

Rules which are formed out of these, in the way of consequence and analogy.

Law formed in this way has received various names. In most of the countries on the Continent it is said to originate in the *usus fori*, "*Gerichtsgebrauch.*" In France it

* Hale, Hist. Com. Law, Ch. iv.

is commonly called "*Jurisprudence.*" In the Roman Law it has no peculiar name; "*Auctoritas,*" etc.: Nor does it seem in that law to have been of any great extent; the use of decided cases as a source of law, having been rendered to a great degree unnecessary by those predeterminations of the Prætors which were contained in their Edicts. In the English Law, it has no peculiar name; the whole of the judicial law being confounded together.

3°. Law fashioned on opinions and practices which obtain amongst lawyers; and which naturally have a great effect upon the decisions of judges. In Rome, the *Jus Civile*, strictly so called, was entirely formed in this manner.

["Pandecten-Recht." In England, "Authoritative writers; Practice of Conveyancers," etc.]

4°. Law formed by judicial decisions upon questions which arise out of the statute law. Decisions on statutes are of two sorts. The judge applies the law to the fact, according to his opinion of the meaning; or (by a process which is generally confounded with interpretation or construction, but which in truth is legislation) he decides according to his own notion of what the legislator ought to have established.

[*v. v.* Rules established in this last way are a species of *Jurisprudence*, etc., as above. Note: such Jurisprudence is sometimes called Equity, etc., (see Equity).

Interpretatio extensiva aut restrictiva ex ratione legis. Instance, Statute *de donis.* Statute of frauds (taken out by part performance). This is manifestly not interpretation or construction, but a correction of the legislator.]

5°. Law framed on foreign law or positive international morality.

Order in which law is naturally generated.*

1°. [Rules established without legislative intervention (whether legislative or judicial). 2°. Adoption and enforcement of these rules by the judge. 3°. Multiplication of these rules in the way of consequence and analogy

* Savigny, Vom Beruf, pp. 16–19. Hugo, Enc. pp. 25–28.

by the same authority. 4°. Judicial legislation (s. s.); whether in the way of establishing new rules or abrogating old ones. 5°. Legislation proper; whether in the way of adoption, establishment of new rules, or abrogation of old ones. 6°. Last form assumed, is that of a Code, in the present acceptation of the term: an attempt by the legislator to reduce the whole mass of rules to a system, and to establish this system as emanating directly from himself.

1. Rules of conduct established by custom. 2. Adoption of these rules by Judge. 3. Additions to these rules in the way of consequence or analogy. 4. New rules introduced by Judges. 5. Legislation following the same order. 6. Action and reaction of judicial legislation and legislation proper: *i.e.* additions to, or subtractions from *Leges* by the judge, and subsequent adoption of these by the legislator. 7. A Code.

A Code, in the present sense of the term (or a complete body of law established by direct legislation) is nearly or altogether a modern thought.*

Justinian's Compilations. Imperfections of all Codes.

No peculiar significance in "code" and "codification." Pandects and Institutes as well as *Codex*, called *Codices*.

The collection, (total or partial) to which the name is given, may take its name, 1°, from the person by whose authority it was made; 2°, from the nation in which it obtains; 3°, from the department of law to which it is limited.

Instances in which judge-made and statute law run into one another.]

A *declaratory law*,† though not a decision upon a question of law in the course of judicial procedure (that is, though it has not necessarily any effect upon the interests of determinate parties) has yet the operation of a judicial decision with respect to cases in general. It is not the

* Anciently, all collections of laws (or legal rules) promulged by the legislature, were called Codes. The modern idea of a Code—a complete and exclusive body of law,—did not arise till after the middle of the last century. First examples of such Codes; in Prussia, 1747, Austria, 1753, Russia, 1767, France, 1793.

† Bentham, Principles, etc., p. 328. Falck, § 16. Blackstone, vol: i. p. 86.

establishment of a new law, but determines the import of pre-existing law.

If it introduce a new rule under colour of explaining an old one, it is not in substance a declaratory law; and is then analogous to the cases in which judges make judicial law, under colour of interpreting statute law, or of getting by induction at prior judge-made law.

If the declaratory law relate to an anterior statute, it is in effect a republication of that statute in a more correct form:—in a form which expresses more precisely the real or supposed intention with which the statute was passed. If it relate to judicial-law, it converts judicial into statute law; superseding the authority of the decision upon which the judicial law formerly rested. Thus the Pandects of Justinian may be considered as an express declaration by the Legislator, that certain writings which had acquired authority in the tribunals should thenceforth be statute law. [*Sed quære*, judicial decisions?]

There is the same difference (with regard to the *occasion* of the declaration) between declaratory laws, that there is between original laws: *i. e.* A declaratory law is either emitted as a general rule, independently of a particular incident, or on occasion of a particular incident. Law of the former sort are, declaratory Acts, etc., Edicts of the Prætor, so far as interpreting: Law of the latter sort, Opinions given by the Roman Emperors at the instance of particular parties; Opinions which Courts of Justice *might* be authorized to give on occasion of transactions contemplated. Rescripts.

The great difference here (as in original legislation) is this; that in the former case the law is not only formally promulged (which is an accident) but is given in abstract, in the form of a general proposition or propositions detached from any actual incident: in the latter, it is given as part of an opinion or decision upon a particular incident; and must always be taken into consideration jointly with

that incident, in order that we may form a correct estimate of its import.

The Rescripts of the Roman Emperors, though issuing from the legislature, were not statute law. They were either decisions on appeal declaratory; or instructions how to decide, issued to inferior judicatories.

In England we have nothing analogous to this: Acts of Parliament relating to particular cases are not decisions in the way of appeal, but *privilegia*: and the House of Lords, though it sit as a Court of Judicature, is not the legislature, but only a branch of it. [Provision in Statute of Treasons.*

In France, perhaps the judicial decisions of the *Conseil du Roi*, which, before the Revolution, performed the functions of the present Court of Cassation, may have resembled, in this respect, the rescripts of the Roman Emperors. But whether such decisions were given in the name of the King (who for a century or two before the revolution was substantially the legislature) I am not able to determine. If not supposed to proceed from him by the advice of his *Conseil*, but to be the act of the *Conseil* itself, sitting as a Court of Cassation, they were *not* analogous to rescripts.

The laws issued by the Prussian Government to decide legal points, are not decisions on the case, but merely on the question of Law which arose in the case. They are properly declaratory laws.†

* Blackstone, Vol. IV. pp. 84, 85.

† See *ante*, Declaratory Laws.

Blackstone, Vol. I. pp. 66, 82. Hugo, Enc., p. 25 to 28. Hugo, Gesch. p. 85, Falck, 25, 134. Savigny, Vom Beruf, pp. 5, 7, 16, 17, 12, 59, 73. Hugo, G. pp. 1003, 10. 26.

NOTES.

"Was die gänzlich aufhebende Auslegung betrifft, so verliert ein Gesetz bloss deswegen seine Gültigkeit nicht, weil die *Gründe* worauf dasselbe ursprünglich beruhte in der Folge ganz wegfielen. 'Wie oft behalten wir nicht,' sagt Struben, 'die *conclusiones*, wenn gleich die *principia* wegfallen, und die *ratio legis* ferner keine Anwendung findet.' Dies hat auch gute und wichtige Gründe für sich. Ein Gesetz kann Nutzen haben ohne dass grade der erste Grund desselben fortdauert. . . . . Ein Gesetz erhält seine Verbindlichkeit nicht durch seinen *Grund*, sondern durch seine *Sanction*." Thibaut, Theorie, etc., p. 102. See *ante*, p. 335.

Which is the most likely to abound with competing analogies? A system of decisions formed at once and resting upon the comprehensive survey of the whole field of Law? Or a *congeries* of decisions made one at a time and in the hurry of judicial business? And, observe, this last objection applies to *customary* as well as to (strictly so called) *jurisprudential* or *judicial* law. For though custom may exist independently of decisions, it only becomes Law in so far as it is recognised by the tribunals. And observe further, that all the objections which may be urged against codification apply in a higher degree to private and unauthorized exposition.—*Marginal Note in Savigny, Vom Beruf, p.* 24.

Laws which are published, and laws which (without derogating from the general law) are only addressed to certain parties: *e. g.* Rescripts,* are not laws, but, like judicial decisions, declaratory or evidentiary of the existence of Law.—*Marginal Note in Falck*, p. 28.

* These Rescripts, though confounded under the common name of "Constitutions" with laws properly so called, were in effect decisions *inter partes* by a supreme Court of Appeal.—See p. 345, *ante*.

LECTURE XXXVIII.

HAVING touched upon a few of the numerous differences which distinguish *statute* from *judiciary* law, I pass to the advantages and disadvantages of judicial or improper legislation, and the possibility of excluding that prevalent mode of legislation, by means of *codes*, or *systems of statute law*.

I will first consider some groundless objections which are made to judiciary law. I then will remark on some of the evils with which it really is pregnant. And having remarked on those evils, I will proceed to the scabrous question of *codification*.

Mr. Bentham's objection to judiciary law, that it is not law.

It seems to be denied by Mr. Bentham, that judiciary law is properly law: that is to say, that it is law imperative. He says it consists, at the most, of *quasi*-commands: of objects not commands, but merely *analogous* to commands.

This objection I have partly answered in preceding lectures. I will, however, advert to it, for a moment, in the present place.

[*v. v.* Shew that a judiciary law (whether made by a sovereign or a subordinate judge) quadrates with his own definition of a genuine though *tacit* command.*

v. v. Connect the confutation with the matter in last Lecture (*Ratio decidendi*, etc., p. 330.

v. v. Perhaps the *ratio decidendi* is not strictly a law, but a *norma* the observance whereof the law enjoins. But this applies

* Fragment on Government, pp. 13, 14. Definitions from 3 to 11, both inclusive. (See end of Lecture.)

to the descriptive or expository portion of a statute law. And sometimes, the norma to be followed is laid down in a statute, and the sanction simply supposed].

A second groundless objection to judiciary law.

Another objection to judicial legislation which is often insisted upon, (and which is urged by Sir Samuel Romilly, in the article already referred to,) is also (I think) founded in mistake. It is objected to judicial legislation, that where subordinate judges have the power of making laws, the community has little or no control over those who make the laws by which its conduct must be governed. Now this objection, it is manifest, is not an objection to *judiciary* law, but to law proceeding from authors (judicial or not) who are not sufficiently responsible to the bulk or mass of the community. It applies to statute law made by the Sovereign directly, in case the supreme government be purely monarchical, or in case it consist of a number with interests adverse to the majority. It applies to statute law made by subordinate judges, (or made directly by any subordinate legislature,) in case that subordinate author be the creature of a monarch or oligarchy, or, for any reason, be too independent of the people. It applies, (it is true) to the *decretes* of the Roman Emperors, acting as supreme judges: but it applies to the Edictal Constitutions of the same Emperors or Princes, acting as sovereign legislators.

In short, the objection is not an objection to judicial legislation, but to *any* legislation of *any* parties who are not sufficiently controlled by positive law, or by the law (improperly so called) which general opinion imposes.

As aimed particularly at *English* judiciary law, the objection in question amounts to this:—that the judges are made by the King, and not by the people or their representatives; and, therefore, are prone to regard the sinister interests of their maker, rather than the general interests, or the interests of the community at large.

But the objection in question, as aimed particularly at

English judiciary law, would apply to *statute* law, made by the English judges after the manner of the Roman Prætors. It would apply, at least, to such statute law, in a considerable degree. For a legislator going to work in the way of judicial legislation, has certainly more opportunities of covering a sinister intent, than a legislator who sets a rule directly and professedly. A statute law being expressed in an abstract or general form, its scope or purpose is commonly manifest. In case, therefore, its purpose be pernicious, its author cannot escape from general censure. But a law made judicially being implicated with a peculiar case, and its purpose not being expressed in any determinate shape, its author can retract and disavow, with comparative ease, in case his intent be dishonest, and excite attention and criticism.

According to Kant,* "the expression, *in abstract and general terms*, of a given maxim or principle, affords a proof, (or a presumption,) that the maxim or principle, as a maxim or principle, is consonant to truth and reason." "Der allgemeine Ausdruck einer Maxime zum Beweise dient, sie sey als Maxime vernünftig."—It certainly affords a proof, (or a presumption,) that, in the opinion of the party who so expresses the maxim, the maxim is consonant to reason, and may be laid open and bare to the examination of others.

And, moreover, the objection in question, as aimed particularly at English judiciary law, is not an objection to judicial legislation, but an objection to the manner in which the judges are appointed. If their appointment by the crown render them obnoxious to its influence, and if their obnoxiousness to the influence of the crown produce judicial legislation adverse to the general interests, let their appointment be vested in some party or another whose interests do not conflict with those of the community at large.

In the last result, indeed, the objection in question, as aimed particularly at *English* judiciary law, is virtually an

* Hugo, Gesch., p. 390.

objection to the constitution or conduct of the sovereign legislature of Britain. For the judicial law made by the English judges, (like the statute law made by the Roman Prætors,) has been formed under the eyes of the sovereign legislature, has been made with the acquiescence of the sovereign legislature, and has been confirmed, in innumerable instances, by its explicit or tacit adoption in statutes passed by itself.

In short, the objection which I now am considering, is not an objection to *judiciary* law. It is an objection to judiciary law (or to *any* law) which is made by the direct establishment, or by the express or tacit authority, of a *bad* sovereign government: of a government whose interests are adverse to those of the generality of its subjects; or which is too ignorant and incapable, or too indifferent and lazy, to conduct or inspect advantageously the important business of legislation.

A third groundless objection to judiciary law.

Another current objection to judiciary law, is also bottomed, it appears to me, in thorough misapprehension. It supposes that judicial legislators legislate arbitrarily: that the body of the law by which the community is governed, is, therefore, varying and uncertain: and that the body of the law for the time being, is, therefore, incoherent.

Now this may be true, to some extent, of *supreme* judicial legislation, for the Sovereign in the character of judge, (like the Sovereign in the character of legislator,) is controlled by nothing but the opinions or sentiments of the community.

But, even in respect of supreme legislation, this objection (like the former) is not peculiarly applicable to judiciary law. It is equally applicable to statute law made directly by the sovereign legislature.

To judiciary law made by subordinate judges, (which, in almost every community, forms the greater portion of

judiciary law,) the objection in question will hardly apply at all. For the *arbitrium* of subordinate judges (like that of the sovereign legislature) is controlled by public opinion. It is controlled, moreover, by the sovereign legislature: under whose inspection their decisions are made; by whose authority their decisions may be reversed; and by whom their misconduct may be punished. Their *arbitrium* is controlled particularly by courts of appeal: by whose judgments their decisions may be reversed; and who may point them out to general disapprobation, or may mark them out as fit objects for legal penalties.

And (admitting that the objection will apply to that judiciary law which is made directly by subordinate judges) it also will apply, with a few modifications, to all statute law which is established by subordinate authors.

The objection, therefore, in question, is an objection to *subordinate* legislation, rather than to *judiciary* law.

But, owing to the restraints to which I have just adverted, it is clear that subordinate judges will rarely legislate arbitrarily, whether they legislate directly (in the manner of the Prætors by their Edicts), or legislate indirectly (in the manner of our own Courts). Where subordinate judges subvert existing law, they commonly are doing that which the opinion of the community requires; to which the sovereign legislature expressly or tacitly consents; and which the sovereign legislature would do directly, if it cared sufficiently for the general interests, or were competent to the business of legislation.

Before I quit the topic which I am immediately considering, I will advert to another cause which controls the *arbitrium* of judges, and makes the rules which they establish by their decisions (or the rules which they establish by direct legislation) consonant with existing law, and consonant with one another.

The cause in question is the influence of private lawyers,

with the authority which is naturally acquired by their professional opinions and practices. The supervision and censure of the bar, and of other practitioners of the law, prevent deviations from existing law, unless they be consonant to the interests of the community, or, at least, to the interests of the craft. And though the interests of the craft are not unfrequently opposed to the interests of the community, the two sets of interests do, in the main, chime.

1. And here I would remark, that the judiciary law made by the tribunals, is, in effect, the joint product of the legal profession, or rather of the most experienced and most skilful part of it: the joint product of the tribunals themselves, and of the private lawyers who by their cunning in the law have gotten the ear of the judicial legislators. In the somewhat disrespectful language of Mr. Bentham, it is not the product of Judge only, but it is the joint product of Judge and Co.

[*v. v.* Inferences drawn by practitioners by consequence and analogy.

These having been acted upon, have the effect of law.

v. v. Bitter complaints against judges who decide against the practice of conveyancers.]

2. The way in which law is made by private lawyers, is well described in the Digests, by an excerpt from *Pomponius*. "Constare non potest jus, nisi sit aliquis jurisperitus, per quem possit quotidie in melius *produci*."—This is almost inevitably the growth of law. The laity (or non-lawyer part of the community) are competent to conceive the more general rules: but none but lawyers (or those whose minds are constantly occupied with the rules) can *produce* (or evolve) those numerous consequences which the rules imply, or can give to the rules themselves the requisite precision.

[*v. v.* "Technical and political elements." Von Savigny. Meaning of his expressions.*

* See end of Lecture.

Independently of the checks which I have just mentioned, judges are naturally determined to abide by old rules, or to form new ones, by consequence from, or analogy to, the old. (*v. v.*) They are naturally determined by two causes.

1. A regard for the interests and expectations which have grown up under established rules: or under consequences and analogies deducible from them.

2. A perception of consequence and analogy: which determines the understanding, independently of any other consideration.

The truth is, that too great a respect for established rules, and too great a regard for consequence and analogy, has generally been shown by the authors of judiciary law. Where the introduction of a new rule would interfere with interests and expectations which have grown out of established ones, it is clearly incumbent on the Judge *stare decisis;* since it is not in his power to indemnify the injured parties. But it is much to be regretted that Judges of capacity, experience, and weight, have not seized every opportunity of introducing a new rule, (a rule beneficial for the future) wherever its introduction would have no such effect.

[Lord Mansfield, Lord Eldon, (e. a.).

Examples of the backwardness of English Judges, which (combined with the incapacity or supineness of the legislature) lead to Equity.—Want of system in Equity itself, owing to the timid circumspection, etc. *Æquitas sequitur legem.*—From this regard to existing rules, arose fictions, and circuitous modes of abrogating law.]

Owing to the causes to which I now have adverted, and to others which I pass in silence, there is more of stability and coherency in judiciary law, than might, at the first blush, be imagined.

And here I must stop for the present. In my next lecture, I will remark on some of the evils with which judiciary law is really pregnant: and I will also advert (as fully as my limits will allow) to the question of codification.

These two topics, with a few others on which I must touch, will fill a long discourse. With that discourse, I shall close my disquisitions on the *sources* of law, and on the *modes* in which it begins and ends.

NOTES.

Definitions from Bentham's Fragment on Government.
See ante, *p.* 348.

3. An *act of obedience* is any act done in pursuance of an *expression of will* on the part of some *superior*.

4. *An act of Political obedience* (which is what is here meant) is any act done in pursuance of an expression of will on the part of a person governing.

5. An *expression of will* is either *parole* or *tacit*.

6. A *parole expression of will* is that which is conveyed by the *signs* called *words*.

7. A *tacit expression of will* is that which is conveyed by any other *signs* whatsoever: among which none are so efficacious as

acts of *punishment* annexed in time past, to the non-performance of acts of the same sort with those that are the objects of the will that is in question.

8. A *parole* expression of the will of a superior is a *command.*

9. When a *tacit* expression of the will of a superior is supposed to have been uttered, it may be styled a *fictitious command.*

10. Were we at liberty to coin words after the manner of the Roman lawyers, we might say a *quasi*-command.

11. The Statute Law is composed of *commands.* The Common Law, of *quasi*-commands.—*Fragment on Government*, p. 13.

Das Daseyn des Rechts ist von nun an künstlicher und verwickelter, indem es ein doppeltes Leben hat, einmal als Theil des ganzen Volkslebens, was es zu seyn nicht aufhört, dann als besondere Wissenschaft, in den Händen der Juristen. Aus dem Zusammenwirken dieses doppelten Lebensprincips erklären sich alle spätere Erscheinungen, und es ist nunmehr begreiflich, wie auch jenes ungeheure Detail ganz auf organische Weise, ohne eigentliche Willkühr und Absicht, entstehen konnte. Der Kürze wegen, nennen wir künftig den *Zusammenhang des Rechts mit dem allgemeinen Volksleben* das *politische* Element; *das abgesonderte wissenschaftliche Leben des Rechts* aber das *technische* Element desselben.—*V. Savigny, Vom Beruf, etc., p.* 12.

1°. That which obtains as Law.

2°. The *knowledge* of that which obtains as Law;

or,

1°. That portion of the unwritten Law which is *not* formed by lawyers.

2°. That portion of the unwritten Law which *is* formed by lawyers.—*Marginal Note.*

One objection made to judiciary law by Sir S. Romilly is that the judge proceeds upon "technical reasons."

This no complete objection, because statute law (e. g. *jus prætorium*) may be formed in the same manner.

LECTURE XXXIX.

In my last evening's discourse, I called your attention to a few of the numerous differences which distinguish *statute law* (or law made by direct, or proper legislation) from *judiciary* law (or law made by judicial, or improper legislation).

Having stated (or suggested) a few of those numerous differences, I passed to the advantages and disadvantages of judicial or improper legislation, and to the possibility of excluding that prevalent mode of legislation, by means of *complete codes*, or *complete systems of statute law*.

Adverting to the last-mentioned subject, I purposed considering the following topics in the following order: *First*, certain groundless objections which have been made to judiciary law; *secondly*, certain of the evils, which, in my opinion, judiciary law really produces; *thirdly*, the possibility of excluding judicial legislation, by means of *complete codes*, or *complete bodies of statute law*.

In pursuance of that purpose, I examined certain objections to judiciary law, which, in my opinion, are founded in misapprehension. In pursuance of the same purpose, I now shall state or suggest a few of the numerous evils which judiciary law really produces: And, having stated or suggested a few of those numerous evils, I shall give to the question of *codification*, that brief and insufficient notice which is all that my time and limits will allow me to bestow upon it.

Before I proceed with the subject of judiciary law I must make a few remarks upon the term.

Note on the terms "judiciary law," "code," etc.

Perhaps I ought to have called it "*judicial* law." The epithet "judicial" has been applied by Sir Samuel Romilly and other eminent men, to improper or indirect legislation. And judges who legislate *as properly judging*, are styled by the same eminent persons "*judicial* legislators."

I find, however, on looking into Mr. Bentham, that he styles the law which is made by judges, *as properly and directly exercising their judicial functions*, "*judiciary* law." And, in the language of French lawyers, the judicial decisions of judges are opposed by the name of "arrêts *judiciaires*" to their *arrêts généraux et réglementaires*;" that is to say, to their statute laws. The difficulty of finding a term at once significant and unambiguous is extreme.

The numerous ambiguities of "unwritten," I have explained in preceding lectures.

At the end of this evening's discourse, or at the beginning of my next lecture, I shall show that the term "*common* law" will not answer the purpose. I will merely remark at present, that, as opposed to "statute law," "common law" excludes statute law, but does not of necessity comprise the whole of judiciary law. As opposed, therefore, to statute law, "common law" is inadequate. And as opposed to the law (styled "equity") which is administered by the extraordinary tribunals styled "courts of equity," "*common* law" is not synonymous with "*judiciary* law." As opposed to "equity," it only includes the judiciary law which is administered by the Courts styled "Courts of Common Law;" and it comprises, moreover, the statute law administered by the same tribunals.

"Judge-made law" (as it has been applied) is also insufficient. As it has been applied, it means *any* law made by *subordinate* judges, or *judiciary* law made by *subordinate* judges. As meaning the first, it includes statute law as

well as judiciary law. As meaning the second, it excludes the judiciary law which is established *directly* by the judicial decisions of *sovereign* or supreme judges.

(*v.v.*) We want a term for the following object: namely, law made *judicially* (or made through *particular* decisions on *particular* cases) by sovereign or subordinate judges. And I think that the term "judicial law," or the term "judiciary law," is the only term which will denote the object adequately and unambiguously.

[The same difficulty about "Code." It may mean a collection of any *portion* of the law; *e.g.* Justinian's Code. Pandects and even Institutes are a part of his code (in the modern sense).

Same of *Gesetzbuch*. Would denote properly a body of statute law: which may coexist with judiciary law.

Law = statutum = positum = lex = Gesetz. Law = jus = Recht = right.

What is wanted is, a name for a *complete* body of statute law: *i.e.* a body of statute law which is the only possible law of the community wherein it obtains.]

Tenable objections to judiciary law.

Having made these remarks upon terms, I proceed to state or suggest a few of the numerous evils, which, in my opinion, judiciary law really produces.

First tenable objection to judiciary law.

First: As I showed in my last lecture, a judiciary law (or a rule of judiciary law) exists nowhere in fixed or determinate expressions. It lies *in concreto*: Or it is implicated with the peculiarities of the particular case or cases by the decision or decisions whereon the law or rule was established. Before we can arrive at the rule, we must abstract the *ratio decidendi* (which really constitutes the rule) from all that is peculiar to the case through which the rule was introduced, or to the resolution of which the rule was originally applied. And in trying to arrive at the rule by this process of abstraction and induction, we must not confine our attention to the general positions or expressions

which the judicial legislator actually employed. We must look at the whole case which it was his business to decide, and to the whole of the discourse by which he signified his decision. And from the whole of his discourse, combined with the whole of the case, we must extract that *ratio decidendi*, or that general principle or ground, which truly constitutes the law that the particular decision established.

But the process of abstraction and induction to which I now have alluded, (and which I analysed at length in my last lecture,) is not uncommonly a delicate and difficult process: its difficulty being proportioned to the number and the intricacy of the cases from which the rule that is sought must be abstracted and induced. Consequently, a rule of judiciary law is less accessible and knowable than a statute law: provided (that is to say) that the statute law with which the rule is compared, be not only expressed in *abstract* and *brief* expressions, but also in such expressions as are *apt* and *unambiguous* as may be. For (as I shall show immediately) the very indeterminateness of its form (or the very indeterminateness of the signs by which it is signified or indicated) renders a judiciary law less uncertain in effect than a statute law unaptly and dubiously worded. But, assuming that a statute law is aptly and unambiguously worded, (or as aptly and unambiguously worded as the subject and language will permit,) it is more accessible and knowable than a rule of judiciary law which must be obtained through the process to which I have adverted above.

And it must be recollected, that whether it be performed by judges applying the rule to subsequent cases, or by private persons in the course of extra-judicial business, this delicate and difficult process is commonly performed in haste. Insomuch that judges in the exercise of their judicial functions, and private persons in their extra-judicial transactions, must often mistake the import of the rule which they are trying to ascertain and apply.

And this naturally conducts me to a *second* objection: namely, that judiciary law (generally speaking) is not only applied in haste, but is also *made* in haste. It is made (generally speaking) in the hurry of judicial business, and not with the mature deliberation which legislation requires, and with which statute law is or might be constructed.

A second tenable objection to judiciary law.

v.v. This is not applicable to all judiciary law: *e.g.* to judiciary law made upon appeal, and after solemn argument and deliberation.

Instance; Decretes of Roman Emperors given in effect by *præfectus prætorii* or jurisconsults whom he employed.

Decision by the Prussian Law-Commission, supposing it a Court of Appeal. How they differ from decisions of a Court of Appeal. (Savigny, Vom Beruf, p. 89.)

But (speaking generally) judiciary law is made in the course of business, and therefore is not constructed with the requisite forethought. The position in which judges are placed, gives them ample opportunities for marking the defects of the law, and enables them to offer to the legislator invaluable suggestions. But I cannot think that their position renders them the best of legislators, or fits them eminently for actual legislation.]

Thirdly: In relation to the decided case by which the rule is introduced, a rule of judiciary law is always (strictly speaking) an *ex post facto* law. And in relation to the case to which it is first applied, it has commonly (though not universally) the effect of a law of the kind.—I think that the objection on which I now am insisting, must be taken with the slight limitation which I have just suggested, and which I will briefly explain.

A third tenable objection to judiciary law.

As I observed in my last lecture, the decisions of the Courts are often anticipated by private practitioners. And the law thus anticipated, though not strictly law, performs the functions of actual law, and generally becomes such ultimately. Now where a rule of judiciary law has been thus anticipated, it may not have the effect of an *ex post facto*

law with reference to the case by which it is introduced. For though the parties to the case have not been forewarned by the legislature, they may have been forewarned by the opinion or practice of those whose opinions and practices the tribunals commonly follow. They could not have guided their conduct by the actual law, but they might have guided their conduct by what it probably would be.

[*v.v.* Same of anticipations by analogy.
I suggest the limitation, being unwilling to exaggerate.]

The limitation, however, is so insignificant, that (speaking generally) a rule of judiciary law, with reference to the case to which it is first applied, is not only strictly an *ex post facto* law, but has all the mischievous consequences of *ex post facto* legislation.

A fourth tenable objection to judiciary law.

Fourthly: For the reasons which I assigned in my last lecture, and for others which I passed in silence, there is more of stability and coherency in judiciary law, than might, at the first blush, be imagined. But though it be never so stable and never so coherent, every system of judiciary law has all the evils of a system which is really vague and inconsistent. This arises mainly from two causes: the enormous bulk of the documents in which the law must be sought, and the difficulty of extracting the law (supposing the decisions known) from the particular decided cases in which it lies imbedded.

By consequence, a system of judiciary law (as every candid man will readily admit) is nearly unknown to the bulk of the community, although they are bound to adjust their conduct to the rules or principles of which it consists. Nay, it is known imperfectly to the mass of lawyers, and even to the most experienced of the legal profession. A man of Lord Eldon's legal learning, and of Lord Eldon's acuteness and comprehension, may know where to find the documents in which the law is preserved, and may be able to extract from the documents the rule for which he is seeking.

To a man, therefore, of Lord Eldon's learning, and of Lord Eldon's acuteness, the law might really serve as a guide of conduct. But by the great body of the legal profession, (when engaged in advising those who resort to them for counsel), the law (generally speaking) is divined rather than ascertained: And whoever has seen opinions even of celebrated lawyers, must know that they are often worded with a discreet and studied ambiguity, which, whilst it saves the credit of the uncertain and perplexed adviser, thickens the doubts of the party who is seeking instruction and guidance. And as to the bulk of the community—the simple-minded laity (to whom, by reason of their simplicity, the law is so benign)—they might as well be subject to the mere *arbitrium* of the tribunals, as to a system of law made by judicial decisions. A few of its rules or principles are extremely simple, and are also exemplified practically in the ordinary course of affairs: Such, for example, are the rules which relate to certain crimes, and to contracts of frequent occurrence. And of these rules or principles, the bulk of the community have some notion. But those portions of the law which are somewhat complex, and are not daily and hourly exemplified in practice, are by the mass of the community utterly unknown, and are by the mass of the community utterly unknowable. Of those, for example, who marry, or of those who purchase land, not one in a hundred (I will venture to affirm) has a distinct notion of the consequences which the law annexes to the transaction.

Consequently, Although judiciary law be really certain and coherent, it has all the mischievous effect (in regard to the bulk of the community) of *ex post facto* legislation. Unable to obtain professional advice, or unable to obtain advice which is sound and safe, men enter into transactions of which they know not the consequences, and then (to their surprise and dismay) find themselves saddled with duties which they never contemplated.

The ordinary course is this:

A man enters into some transaction (say, for example, a contract) either without advice, or with the advice of an incompetent attorney.

By consequence, he gets into a scrape.

Finding himself in a scrape, he submits a case, through his attorney, to counsel.

And, for the fee to attorney and counsel, he has the exquisite satisfaction of learning with certainty that the mischief is irremediable.

[*v. v.* I am far from thinking, that the law ever can be so condensed and simplified, that any considerable portion of the community may know the whole or much of it.

But I think that it may be so condensed and simplified, that *lawyers* may know it: And that at a moderate expense, the rest of the community may learn from lawyers beforehand the legal effect of transactions in which they are about to engage.

v. v. Not to mention (as I shall show, when I come to the *rationale* of the distinction between Law of Things and Law of Persons) that the law may be so arranged, that each of the different classes of persons may know something of the part of it with which they are particularly concerned.

v.v. Forms, too, for the more usual transactions might be made out by the legislature.

v.v. Mischief done to the cause of codification, by overstating the degree of simplicity which can be given to the law.

Inconsistency of Mr. Bentham and others in this respect. When speaking of law in general, they insist on the simplicity and brevity which may be given to the system: When descending to its particular parts, they insist on its complexity.]

The evil upon which I am insisting, is certainly not *peculiar* to judiciary law. Statute law badly expressed, and made bit by bit, may be just as bulky and just as inaccessible as law of the opposite kind. But there is this essential difference between the kinds of law. The evil is inherent in judiciary law, although it be as well constructed as judiciary law can be. But statute law (though it often is

bulky and obscure) *may be* compact and perspicuous, if constructed with care and skill.

[*v.v.* Judiciary law not attested by authoritative documents, but residing in the memory of judicial officers, or attested by the disputable records of private and unauthorized reporters. An evil not inherent in judiciary law.

This evil, however, is merely accidental. Decisions might be reported by authorized reporters, and their reports might be made official evidence of what fell from the judges. Examples: Year-books. Lord Bacon's proposal.*

v.v. Besides, statute law is not of necessity written, any more than it is of necessity promulged.

v.v. Monstrous state of things where judiciary law is not recorded and published even by private reporters.—Ex. Some of the smaller German States. Thibaut's "Nothwendigkeit,"†—An approach to this in England, in some cases; viz. Practice of lower and even higher tribunals. Floating law not reported.]

Fifthly: I am not aware that there is any *test* by which the validity of a rule made judicially can be ascertained. A fifth tenable objection to judiciary law.

Is it the *number* of decisions in which a rule has been followed, that makes it law binding on future judges? Or is it the *elegantia* of the rule (to borrow the language of the Roman lawyers), or its consistency and harmony with the bulk of the legal system? Or is it the *reputation* of the judge or judges by whom the case or cases introducing the rule were decided?

In the Roman law, the operation of judicial decisions, in the way of establishing law, is styled (as I have stated before) "auctoritas rerum *perpetuo* similiter judicatarum." And, looking at the form of the expression, we might infer that a rule is not binding, unless it has been applied to the decision of *many* resembling cases, or, at least, of more cases

* See *ante*, pp. 206–7.

† "Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland" (in the "Civilistische Abhandlungen," and also printed separately, Heidelberg, 4th edit.) This is the book to which v. Savigny's "Vom Beruf" was an answer.

than one. But, this notwithstanding, there are many rules of law in the Roman system which rest on a single decision of a single tribunal.*

In fine, we never can be absolutely certain (so far as I know) that any judiciary rule is good or valid law, and will certainly be followed by future judges in cases resembling the cases by which it has been introduced.

Here then is a cause of uncertainty which seems to be of the essence of *judiciary* law. For I am not aware of any contrivance by which the inconvenience could be obviated.

It is manifestly *not* of the essence of *statute* law. For assuming that statute law is well constructed, and is also approved of by the bulk of the community, it is absolutely certain until it is repealed.

If, indeed, it be obscure, or if it be generally disliked, it is not more certain than judiciary law. If it be obscure, it is not knowable. And if it be generally disliked, although it be perfectly perspicuous, it probably will be abrogated by the tribunals at the instance of public opinion.

[*v.v.* Murat's account of American legislation.† An example of the impossibility of excluding judiciary law, where legislature is incompetent.

v.v. Objection to the use of the word "induction," where the law is gathered from a single decision. I have called it "the *peculiar* process of induction, etc." For interpretation is itself a process of induction.]

* Falck, p. 19. See End of Lecture.

† It may not be impertinent to say that the 'Murat' here alluded to is Achille Murat, the eldest son of the somewhile King of Naples. After the fall of Bonaparte he settled in America, where he married a grand-niece of Washington and became a practising advocate at the American bar. In 1831 he and his wife resided for some time in England and frequently visited us. The conversation between Mr. Austin and M. Murat almost always turned on law. It was strange to hear the technical language of English law familiarly used by a man whose features reminded one at every moment of his origin, and of the widely different destiny which had seemed to await him. M. Murat afterwards wrote a book in which the institution of slavery was represented as indispensable to the highest forms of civilization. He died some years ago.—*S. A.*

Sixthly: In consequence of the implication of the *ratio decidendi* with the peculiarities of the decided case, the rule established by the decision (or the *ratio*; or the general principle of the decision) is never or rarely comprehensive.* It is almost necessarily confined to such future cases as closely resemble the case actually decided: although other cases more remotely resembling, may need the care of the legislator. In other words, the rule is necessarily limited to a narrow *species* or sort, although the *genus* or kind, which includes that *species* or sort, ought to be provided for at the same time by one comprehensive law. A sixth tenable objection to judiciary law.

This is excellently explained by Sir Samuel Romilly, in that admirable article on Codification which I ventured to criticize in my last evening's discourse.

The passage is as follows:

"Not only is the Judge, who at the very moment when he is making law, is bound to profess that it is his province only to declare it; not only is he thus confined to technical doctrines and to artificial reasoning,—he is further compelled to take the narrowest view possible of every subject on which he legislates. *The law he makes is necessarily restricted to the particular case which gives occasion for its promulgation.* Often when he is providing for that particular case, or according to the fiction of our Constitution, is declaring how the ancient and long-forgotten law has provided for it, he represents to himself other cases which probably may arise, though there is no record of their ever having yet occurred, which will as urgently call for a remedy, as that which it is his duty to decide. It would be a prudent part to provide, by one comprehensive rule, as well for these possible events, as for the actual case that is

* Extension or restriction of the *ratio decidendi* is possible: (but must not be confounded with an extension or restriction of the decision itself): or, rather, *ratio* being expressed by its introducer inadequately, may be extended or restricted (in expression and application) by subsequent judges.

in dispute, and, while terminating the existing litigation, to obviate and prevent all future contests. This, however, is, to the judicial legislator, strictly forbidden; and if, in illustrating the grounds of his judgment, he adverts to other and analogous cases, and presumes to anticipate how they should be decided, he is considered as exceeding his province; and the opinions thus delivered, are treated by succeeding judges as extrajudicial, and as entitled to no authority."*

[*v.v.* Exemplify by Read *v.* Brookman, 3 T. R. 151.

v.v. Hence, exigencies of society provided for bit by bit, and therefore slowly.

v.v. Hence, further, immense volume of the documents in which the law is recorded. For in lieu of one comprehensive rule determining a *genus* of cases, we have many several and narrow rules severally determining the species which that *genus* includes.]

And this inconvenience (for a reason which I have noticed above) is probably of the essence of judiciary law. So delicate and difficult is the task of legislation, that any comprehensive rule, made in haste, and under a pressure of business, would probably be ill adapted to meet the contemplated purpose. It is certain that the most experienced, and the most learned and able of our judges, have commonly abstained the most scrupulously from throwing out general propositions which were not as proximate as possible to the case awaiting solution: Though (for the reasons which I stated in my last lecture, and to which I shall revert immediately) the *ratio decidendi* (or ground or *principle* of decision) is necessarily a general position applying to a class of cases, and does not concern exclusively the particular case in question. I have heard Lord Eldon declare (more than once) that nothing should provoke him to decide more than the decision of the case in question absolutely required.

* Ed. Rev. vol. xxix. p. 231.

[Conversely, the reason may be too large. And hence the necessity of narrowing it by distinctions.]

A seventh tenable objection to judiciary law.

Seventhly: wherever much of the law is judiciary law, the statute law which coexists with it, is imperfect, unsystematic, and bulky.

For the judiciary law is, as it were, the *nucleus* around which the statute law is formed. The judiciary law contains the *legal dictionary*, or the definitions and expositions (in so far as such exist) of the leading technical terms of the entire legal system. The statute law is not a whole of itself, but is formed or fashioned on the judiciary law, and tacitly refers throughout to those leading terms and principiples which are expounded by the judiciary.—And hence, as I shall shew immediately, arises the greatest difficulty in the way of codification. For, in order to the exclusion of the judiciary law, and to the making of the code a complete body of law, the terms and principles of the judiciary must not be assumed tacitly, but must be defined and expounded by the code itself: A process which people may think an easy one—until they come to *try* it.

Wherever, therefore, much of the law consists of judiciary law, the statute law is not of itself complete, but is merely a partial and irregular supplement to that judiciary law which is the mass and bulk of the system. The statute law is not of itself an edifice, but is merely a set of irregular or unsystematic patches stuck from time to time upon the edifice reared by judges.

It is true that a body of statute law (though it be not stuck patchwise on a groundwork of judiciary law) may be irregular and bulky.

This is actually the case with that portion of the Prussian Law which has been made from time to time for the purpose of amending the Code.

v. v. (Explain its nature.)*

* See Savigny, Vom Beruf, p. 89.

But the evil is mainly occasioned (as I shall shew immediately) by the bad construction of the code itself.

And there is this essential difference between a complete body of statute law, and a body of statute law stuck patchwise on a groundwork of judiciary law. The latter *must* be irregular; *must* be bulky; and therefore *must* be difficult of access. The latter *may* be systematic; *may* be compact; and therefore *may* be (in the language of Mr. Bentham) *cognoscible.*

Wherever, therefore, much of the law consists of judiciary law, the entire legal system, or the entire *corpus juris*, is necessarily a monstrous chaos: partly consisting of *judiciary* law, introduced bit by bit, and imbedded in a measureless heap of particular judicial decisions, and partly of legislative law stuck by patches on the judiciary law, and imbedded in a measureless heap of occasional and supplemental statutes.

Introduction to question of codification.

Since such are the monstrous evils of judicial legislation, it would seem that the expediency of *a Code* (or of a complete or exclusive body of statute law) will hardly admit of a doubt. Nor would it, provided that the chaos of judiciary law, and of the statute law stuck patchwise on the judiciary, could be superseded by a *good* code. For when we contrast the chaos with a positive code, we must not contrast it with the very best of possible or conceivable codes, but with the code, which, under the given circumstances of the given community, would probably be the result of an attempt to codify.

Whoever has considered the difficulty of making a good statute, will not think lightly of the difficulty of making a code.

To conceive distinctly the general purpose of a statute, to conceive distinctly the subordinate provisions through which its general purpose must be accomplished, and to express that general purpose and those subordinate provisions in perfectly adequate and not ambiguous language, is a bu-

siness of extreme delicacy, and of extreme difficulty, though it is frequently tossed by legislators to inferior and incompetent workmen. I will venture to affirm, that what is commonly called the *technical* part of legislation, is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver.

Accordingly, statutes made with great deliberation, and by learned and judicious lawyers, have been expressed so obscurely, or have been constructed so unaptly, that decisions interpreting the sense of their provisions, or supplying and correcting their provisions *ex ratione legis*, have been of necessity heaped upon them by the Courts of Justice. Such, for example, is the case with the Statute of Frauds; which was made by three of the wisest lawyers in the reign of Charles the Second: Sir M. Hale (if I remember aright) being one of them.

And here I may remark, that, unless a statute be well made, it commonly is more uncertain than a rule of judiciary law.

In performing the process of induction (described in my last lecture) by which a judiciary rule is extracted from a particular decision, the interpreting judge is not tied to the expressions which his legislating predecessor has actually employed. He may collect the *ratio decidendi* (or the general ground or principle which constitutes the rule that is sought) from any *indicia* whatever which the case or its circumstances may afford.

But a judge who interprets or construes (in the proper sense of the word) a provision of a statute law, is tied to the very expressions in which the provision is given. And looking at those very expressions, and at the design of the provision and the statute, he may find it impossible to determine with certainty the import of the provision. For the expressions in which it is conceived may seem to say one

thing, whilst the particular scope of the provision, or the predominant design of the statute, may indicate a different meaning. Now if he might gather the meaning from any *indicia* (like the judge who extracts a rule from a judicial decision) he would find no difficulty. He would resort at once to the design of the provision, or the design of the whole statute, and put upon the terms of the provision such a construction as would make the legislator consistent with himself. But being obliged to attend partly to the probable grammatical meaning of the very terms, he can hardly decide with a perfect assurance that he is construing the statute correctly.

Its very want of a precise form, renders a judicial rule (in spite of its inherent uncertainty) less uncertain than a badly constructed statute.

It is hardly necessary to add, that I limit the remark to a badly constructed statute. For no judicious or candid man will doubt or dispute for a moment, that a well-made statute is incomparably superior to a rule of judiciary law.

It follows from what I have premised, and will appear clearly from the remainder of my discourse, that the question of codification is a question of time and place. Speaking in abstract (or without reference to the circumstances of a given community) there can be no doubt that a complete code is better than a body of judiciary law: or is better than a body of law partly consisting of judiciary law, and partly of statute law stuck patchwise on a body of judiciary.

But taking the question in concrete (or with a view to the expediency of codification in this or that community) a doubt may arise. For here we must contrast the existing law (not with the *beau idéal* of possible codes, but) with that particular code which an attempt to codify would then and there engender. And that particular and practical question (as M. von Savigny has rightly judged) will turn

mainly on the answer that must be given to another: namely, Are there men, then and there, competent to the difficult task of successful codification? of producing a code, which, on the whole, would more than compensate the evil that must necessarily attend the change? The vast difficulty of successful codification, no rational advocate of codification will deny or doubt. Its impossibility, none of its rational opponents will venture to affirm.

Before I proceed to the question, I beg leave to explain a remark which I made last evening.—When I said that the question of codification lay in a narrow compass, I meant, that little could be said *pertinently* about the question *in abstract*. The question in concrete (or with reference to a given community at a given time) involves, of course, a considerable number of particular considerations: considerations, however, which fall not within my design, and to which, therefore, I did not advert. And, in order to show the little which can be said about the question in abstract, it is necessary to show the impertinence of almost all the arguments which have been adduced by the advocates on each of the two sides. To strip the question of those impertinent arguments, and to show how little can be said about it in a pertinent manner, is therefore a task of considerable length, although the pertinent considerations occupy a narrow space.

In my opinion, a mere statement of the evils inherent in judiciary law, is amply sufficient to demonstrate (considering the question in abstract) that codification is expedient.

In considering, therefore, the question of codification, (to which I now proceed,) I shall merely show the futility of the leading or principal arguments which are advanced against codification considered generally or in abstract. A consideration of its expediency here or there, would involve particular considerations beside the scope of my Course, and surpassing the space and time which I can afford to assign to the subject.

Before I advert to those arguments, I would briefly interpose the following remarks:—

In speaking of the advantages and disadvantages of statute and judiciary law I advert to the form and not to the matter. It is clear that these considerations are completely distinct. It is clear that judiciary law of which the purposes are beneficent, may produce all the evils on which I have insisted. It is clear that statute law, well arranged and expressed, may aim at pernicious ends.

In like manner, codification does not involve any innovation on the *matter* of the existing law. It is clear that the Law of England might change its shape completely, although the rights and duties which it confers and imposes, remained substantially the same. In treating of codification, I consider law from its merely technical side, or with a view to the consequences, good or evil, of arrangement and expression.*

[*v. v.* These distinct ideas are often confounded.]

First leading objection to codification.

The current objection to codification, is the necessary incompleteness of a code. It is said that the individual cases which may arise in fact or practice, are infinite: and that, therefore, they cannot be anticipated, and provided for, by a body of general rules. The objection (as applied to statute law generally) is thus put by Lord Mansfield in the case of Omychund and Barker. [He was then Solicitor-General.] "Cases of law depend upon occasions which give rise to them. All occasions do not arise at once. A statute very seldom can take in all cases. Therefore the common law that works itself pure by rules drawn from the fountains of justice, is superior to an act of parliament."

My answer to this objection is, that it is equally applicable to all law: and that it implies in the partisans of judiciary law, (who are pleased to insist upon it,) a profound

* Vom Beruf, pp. 18, 47.

ignorance, or a complete forgetfulness, of the nature of the law which is established by judicial decisions.

Judiciary law consists of *rules*, or it is merely a heap of particular decisions inapplicable to the solution of future cases. On the last supposition, it is not law at all: And the judges who apply decided cases to the resolution of other cases, are not resolving the latter by any determinate law, but are deciding them arbitrarily.

The truth, however, is, as I showed in my last lecture, that the general grounds or principles of judicial decisions are as completely Law as statute law itself, though they differ considerably from statutes in the manner and form of expression. And being law, it is clear that they are liable to the very imperfection which is objected to statute law. Be the law statute or judiciary, it cannot anticipate all the cases which may possibly arise in practice.

The objection implies, that all judicial decisions which are not applications of statutes are merely arbitrary. It therefore involves a double mistake. It mistakes the nature of judiciary law, and it confounds law with the *arbitrium* of the judge. Deciding arbitrarily, the judge no doubt may provide for all possible cases. But whether providing for them thus be providing for them by law, I leave it to the judicious to consider.

If law, as reduced into a code, would be incomplete, so is it incomplete as not so reduced. For codification is the re-expression of existing law. It is true, that the code might be incomplete, owing to an oversight of redactors. But this is an objection to codification *in particular*.

The objection as put by Portalis, one of the redactors of the French Code,* proves that there can be no law, or that every decision is arbitrary. For if the provision of a given statute will not apply to any given case, the *ratio decidendi* of a given judicial decision will not apply to the solution of future cases.

* Vom Beruf, pp. 73, 74. See end of Lecture.

Hugo's objection* proceeds on the mistake of supposing that a Code must provide for every possible concrete case. But this (as I have shown already) is what no law (statute or written) can possibly accomplish. It would be endless.

His objection is, that if a body of law affected to provide for every possible question, its provisions would be so numerous that no judge could embrace them: And as to the cases which it left undecided (which would necessarily be numerous) the conflicting analogies presented by those cases would be in exact proportion to the number and minuteness of its provisions.

As to the first part of the objection, it is necessary to provide *a priori* for cases to arise in future, or to leave such cases to the mere *arbitrium* of the judge. And I would submit, that you do not obviate the incompleteness inherent in statute law *by making no law.*

The second objection is founded on the supposition that the provisions of a code are more minute and numerous than the rules embraced by a system of judiciary law: that the more minute and numerous the rules, the more likely it is that they will conflict; and, that, in trying to apply the law to a given case, a conflict of opposite rules will arise.

Now it seems to me that this is the reverse of the truth.

As I have shown above, a rule made by judicial decision is almost necessarily narrow: whilst statute laws may be made comprehensively, and may embrace a whole genus of cases, instead of embracing only one of the species which it contains.

And which, I would ask, is the most likely to be bulky and inconsistent: A system of rules formed together, and made on a comprehensive survey of the whole field of law? or a *congeries* of decisions made one at a time, and in the hurry of judicial business?

Repetition and inconsistency are far more likely, where

* Vom Beruf, pp. 23, 24. See end of Lecture.

rules are formed one by one, (and, perhaps, without concert, by many distinct tribunals,) than where all are made at once by a single individual or body, who are trying to embrace the whole field of law, and so to construct every rule as that it may harmonize with the rest.

And here I would make a remark which the objection in question suggests, and which to my understanding, is quite conclusive.

Rules of judiciary law are not decided cases, but the *general* grounds or principles (or the *rationes decidendi*) whereon the cases are decided. Now, by the practical admission of those who apply these grounds or principles, they may be codified, or turned into statute laws. For what is that process of induction by which the principle is gathered before it is applied, but this very process of codifying such principles, performed on a particular occasion, and performed on a small scale? If it be possible to extract from a case, or from a few cases, the *ratio decidendi*, or general principle of decision, it is possible to extract from all decided cases their respective grounds of decisions, and to turn them into a body of law, abstract in its form, and therefore compact and accessible.

Assuming that judiciary law is really law, it clearly may be codified.

Reverting to the objection, I admit that no code can be complete or perfect. But it may be less incomplete than judge-made law, and (if well constructed) free from the great defects which I have pointed out in the latter. It may be brief, compact, systematic, and therefore knowable as far as it goes.

[Besides; Devices for mending defects, and keeping down growth of judge-made law: working it in.

Neglect of this by French and Prussian legislators.

Provision of Prussian Code.]

Notes.

Innovations on the *matter* of the existing law have no necessary connection with codification.—*Marginal note in Savigny, Vom Beruf*, p. 18.

Portalis' objection, as cited by Savigny, is this: 'On sait que jamais, ou presque jamais, dans aucun procès on ne peut citer un texte bien clair et bien précis de lois, en sorte que ce n'est jamais que par le bon sens et par l'équité que l'on peut décider.'

This goes to prove that there can be no law, no rule of conduct; that every decision must be arbitrary.—*Marginal note, Vom Beruf*, pp. 73, 74.

Hugo's objection, as cited by Savigny, is as follows: "Wenn alle Rechtsfragen von oben herab entschieden werden sollten, so würde es solcher Entscheidungen so viele geben, dass es kaum möglich wäre, sie alle zu kennen; und für die unentschiedenen Fälle, deren noch immer genug übrig blieben, gäbe es nur um so mehr widersprechende Analogien."

Which is the most likely to abound with "competing analogies"? A *system* of decisions formed at once, and resting upon a comprehensive survey of the whole field of Law? Or a *congeries* of decisions made at one time, and in the hurry of judicial business? And observe, this last objection applies to *customary* as well as to (strictly so called) *jurisprudential* or *judicial* law; for though custom may exist independently of decisions, it only becomes *law* in so far as it is recognized by the tribunals. And observe further, that all the objections which may be urged against codification, apply in a higher degree to private and unauthorized exposition.—*Marginal note, Vom Beruf*, pp. 24, 25.

LECTURE XL.

This Lecture is wanting.

On the first examination of Mr. Austin's manuscripts, I found this Lecture wanting. From that time to this I have cherished the hope that, in the mass of loose papers, I might find, if not the whole Lecture, at least fragments of it, or indications of sources from whence the chasm might (imperfectly) be filled.

This hope I am reluctantly compelled to abandon. After the most minute search, I can find no trace or fragment of the missing Lecture, nor even any of those suggestive notes which served the Author as text for *vivâ voce* exposition; many examples of which are found in this volume. After careful examination, I have come to the conclusion that there is nothing which would, in any degree, supply the deficiency.

As to the cause or manner of the disappearance of this Lecture, I can form no conjecture. There are sufficient indications from dates, etc., that it existed, and was delivered in the regular course. Indeed, the summary or recapitulation with which the next Lecture opens, affords evidence of the value and completeness of that which is unhappily lost.

I can hardly hope that any member of Mr. Austin's class still possesses notes of his course. But if any such memoranda are in existence, I should esteem myself under a great obligation to any gentleman who would permit me to see them.

I take this opportunity of correcting an error in the new edition of the first volume of this work.—("Province of Jurisprudence," Outline, p. lxxi.) The lecture referred to in the note is the missing one, and should have been numbered XL., instead of XLII. Or rather, the note should not have been printed.

S. A.

LECTURE XLI.

In my last lecture, I endeavoured to explain the import of the distinction between the Law of Persons and the Law of Things.

Endeavouring to explain the import of the distinction, I stated the meanings of the obscure and obscuring expressions "jus personarum" and "jus rerum:" or (in the language of the classical Roman jurists) "jus ad *personas* pertinens, et jus ad *res* pertinens." And I also stated the import of the distinction, as it was conceived in general by those who devised it: namely, the same Classical Jurists, in their elementary or institutional treatises.

Having explained the import of the distinction, and cleared up the terms in which it is usually expressed, I proceeded to illustrate its nature, by showing its purposes and uses. I showed that the distinction is purely arbitrary: or that the distinction was devised by its authors, to facilitate the arrangement and exposition of the *corpus juris*, or entire body or system of positive law. I showed that the arrangements which are built on the distinction, (or which might be built on the distinction,) are probably the most commodious of which the *corpus juris* will admit. And I shortly contrasted the arrangements which are built on this distinction, with certain possible arrangements founded on other principles.

The Law of Persons being the Law of *Status*, and the Law of Things being *the* Law *minus* the Law of *Status*, it is clear that the distinction between the Law of Persons

and the Law of Things, turns upon the notion of *Status* or *Condition*, or upon the notion of *person* as meaning *status* or *condition*. The sets of rights or duties, capacities or incapacities, which are deemed *status*, conditions, or persons, are detached from the bulk of the legal system, and placed in a peculiar department styled the Law of Persons: Or certain sets of rights, etc. are detached from the bulk of the legal system, and placed in that peculiar department, and are styled therefore *status*, conditions, or persons. And the bulk of the legal system, *minus* these *status* or conditions, is distinguished by the name of "the Law of Things" from that peculiar department to which conditions are banished.

"I have remarked" (says Mr. Von Savigny, in the treatise on which I commented the other evening,) "that the ideas of *jus in rem* et *jus in personam* (or *dominium et obligatio*) are, in the Roman Law, all-pervading; '*überall-eingreifend.*'* And the same remark will apply to the idea of *status*: for on the idea of *status*, the distinction between the Law of Persons and the Law of Things is founded."

Accordingly, I endeavoured, in my last lecture, to determine the notion of *status*. Or (rather) I endeavoured to shew, that the notion cannot be determined with a close approach to precision: that certain sets of rights or duties, or capacities or incapacities, are, for the sake of commodious arrangement, detached from the body of the law, and placed in a peculiar department: and that to those sets of rights, etc., which for the sake of arrangement and exposition it is found convenient thus to detach, the name of *status* is applied, or is more particularly applied.

Certain erroneous definitions of the idea of *status* and of the distinction (founded on that idea) between *jus personarum* et *jus rerum*.

I now will examine certain definitions of *status*, with certain definitions of the distinction founded on the idea of *status*, which, in my opinion, are thoroughly erroneous, and have engendered much of the obscurity wherein the idea and the distinction are involved.

* ". . . . wie wichtig und überall eingreifend im römischen Rechte die

According to a definition of *status*, which now (I think) is exploded, but which was formerly current with modern civilians, "Status est *qualitas*, cujus ratione homines diverso jure utuntur." "Exempli gratia," (adds Heineccius,) "alio jure utitur liber homo; alio, servus; alio, civis; alio, peregrinus."*

Now a given person bears a given condition, (or, in other words, belongs to a given class,) by virtue of the rights or duties, the capacities or incapacities, which are peculiar to persons of that given kind or sort. Those rights or duties, capacities or incapacities, *are* the condition or *status* with which the person is clothed. They are considered as forming a complex whole: And, as forming a complex whole, they are said to constitute a *status* which the person occupies, or a condition, character, or *person*, which the person bears.

But, according to the definition which I now am considering, the rights or duties, capacities or incapacities, are not themselves the *status:* but the *status* is a quality which lies or inheres in the given person, and of which the rights or duties, capacities or incapacities, are merely products or consequences.

The definition (it is manifest) is merely a *case* of the once current jargon about *occult qualities*. Wherever phenomena were connected in the way of cause and effect, (or of customary antecedence and sequence, or customary coexistence,) it was usual to impute the so-called effect, (not to the customary antecedent, or to the customary coexistent,) but to an occult quality, or occult property, which was supposed to intervene in the business of causation.

höchst bestimmte Begriffe von dinglichen Rechten und Obligationen sind. Dasselbe gilt vom Begriff des Status. Hier nun liegt die Unterscheidung von Personenrechten und Sachenrechten zum Grunde."—*Vom Beruf*, p. 98.

* "*Homo et persona* grammatice sunt synonyma, at juridice differunt. Omnis quidem persona homo est, sed non omnis homo est persona. *Homo est*, quicumque habet mentem ratione præditam in corpore humano: ast *persona* est homo cum statu suo consideratus. Qui itaque statum non habet, is nec est persona."—*Heineccii Recitationes*, Lib. i. tit. 3.

For example: In the case of volition followed by action or forbearance, (which I analysed in a former lecture,) the antecedent desire or aversion, with the consequent action or forbearance, are really the only entities. But, this notwithstanding, a certain entity styled the will, (or a certain willing will) is supposed to be the cause of the desire or aversion which is truly the cause or antecedent of the consequent action or forbearance.

In the case of a condition or *status*, the occult quality (if it mean anything) is the fact or event from which the condition arises: that is to say, through or by which, or *ratione cujus*, the party bears the rights, or is subject to the duties, of which the condition is composed. In the case, for example, of the correlating conditions which are borne by husband and wife, the occult quality (if it mean anything) is the fact of the marriage: For through or in consequence of the marriage (or *ratione ejus*) the parties to the marriage contract "*diverso jure utuntur:*" that is to say, they are clothed with the rights and capacities, and subjected to the duties and incapacities, which distinguish husbands and wives from persons of other classes, or which constitute the *status* or conditions borne by husbands and wives.

But, not content with this homely account of the matter, the scholastic jurists imagined a fictitious entity intervening between the condition and the fact engendering the condition: "*qualitas ratione cujus homo diverso jure utitur:*" an occult quality inhering in the given person, by virtue whereof he is clothed with distinguishing rights, or is subjected to distinguishing duties. And to this fictitious entity, (and not to those rights or duties, or to the fact which begets them,) these scholastic jurists gave the name of *status*.

Before I dismiss the definition which I am now considering, I will remark that the *qualitas* in question (assuming its existence) will not distinguish a *status* or condition from another set or collection of rights or duties. If the rights

or duties which constitute a *status* or condition spring from an occult quality lying in the person who bears it, every right or duty must spring from a similar quality in the person who is clothed with the right, or on whom the duty is incumbent. For example: An estate in fee-simple, or an estate for life or years, is not the effect or consequence of the descent from the deceased ancestor, or of the conveyance or demise. It is clearly the effect or consequence of a certain occult quality which lies in the tenant in fee or the tenant for life or years. It springs from an estate-in-fee-giving quality, or an estate-for-life-or-an-estate-for-years-giving quality, which resides in the party who is clothed with the right or interest. As (in the scholastic philosophy) a house was burnt by fire, or a block split by a wedge, through a certain house-burning quality, or a certain block-splitting quality, which inhered in the fire or the wedge. It is pertinently asked by Mr. Thibaut, (who, with his usual perspicacity, detects the absurdity of the definition,) wherein the inlying quality of a husband or guardian can consist, unless it consists in the fact of the marriage, or in the acceptance by the guardian of the proffered wardship?* And if the marriage or acceptance constitute an occult quality inhering or lying in the husband or guardian, must not a similar quality reside in every party, who, by a contract, or by any other fact, acquires any right, or is subjected to any duty.

The supposition that a *status* is a quality inhering in the party who bears it, has every fault which can possibly belong to a figment. It is merely a figment, or gratuitous

* Der Begriff vom Statu (s. s.) ist so vag, dass er allen Unterschied zwischen *jus personarum* und *rerum* aufhebt. *Wodurch entsteht die Qualität, dass jemand Tutor, Magistrat, oder Ehemann ist?* Doch durch nichts anders, als dadurch, dass er die Würde und Tutel übernimmt, und die Ehe schliest. Ist diess mehr in der Person liegende Qualität, als wenn ich mich durch einen Vertrag anheischig mache, ein Mandat zu übernehmen, als wenn ich erkläre, ein Erbschaft haben zu wollen, u. s. w.?—*Thibaut, Versuche*, vol. ii. p. 19.

supposition: And, admitting it, it will not serve to characterize the object, for the purpose of distinguishing which the fictitious quality was devised.

It is remarkable that Mr. Bentham (who has cleared the moral sciences from such heaps of perilous trash) adopts this occult quality under a different name. In the chapter in the *Traités de Législation*, which treats of *États* (or of *status* or conditions,) he defines a *status* thus: "Un état domestique ou civil n'est *qu'une base idéale*, autour de laquelle se rangent des droits et des devoirs, et quelquefois des incapacités."*

Now this *base idéale* (which is distinct from the rights or duties constituting the condition, and also from the fact or event by which the condition is engendered) is clearly the fictitious quality (expressed in another shape,) which, according to the scholastic jurists, forms the *status*.

And the error is the more remarkable, inasmuch as Mr. Bentham, in the next sentence but one, tells us, with perfect correctness, that "connoître un état, c'est connoître séparément les droits et les devoirs qui y sont réunis:" implying that a *status* or condition is nothing fictitious or ideal, but a lot of rights or duties marked by a collective name, and bound by that name into a complex aggregate.

I will briefly remark, before I proceed to the next topic, that the *status* consists of the peculiar *rights* or *duties* (or the peculiar *capacities* or *incapacities*,) and not of the *fact* or *event* which is mediately or immediately their legal cause or antecedent. For example: The peculiar rights and duties of husband and wife, and not the marriage from which they arise, constitute the correlating conditions borne by the two parties.

* *État*: A collective name for the actual and possible rights and obligations of some given person, and for such incapacities and exemptions as he may lie under or enjoy.—*Marginal Note in Bentham, Traités, etc.*, vol. i. p. 294.

The absurd definitions of *status* which I have examined, probably arose from neglect of the very obvious truth which I now have suggested.

Through an ellipsis (or an abridged form of expression) we ascribe the rights or duties which constitute a *status*, (not to the fact or event which engendered the *status*, but) to the very *status* of which they are constituent elements. We talk, for example, of an action *ex statu*, or of a right of action founded on a *status*; meaning in truth (if we speak with a determinate meaning) a right of action arising from the fact by which the *status* was begotten. For the right of action being parcel of the *status*, is not the legal consequence of the *status* itself, but (with the rest of the *status* of which it is parcel,) is the legal consequence of the fact from which the *status* arises.

The authors, therefore, of the absurd definitions in question, naturally reasoned thus: "The fact or event from which a *status* arises, is not the *status* itself. Nor is *status*, *conditio* or *persona*, a collective name for an aggregate of rights or duties: inasmuch as rights or duties are styled "*ex statu*," or are said to be consequences of *status*. Consequently, there must be a *tertium quid*, (distinct from the fact, on the one hand; and from the rights or duties, on the other,) of which those rights or duties are products or effects. But what is that *tertium quid?* Why clearly, an occult quality lying or inhering in the person by whom the *status* or *person* is said to be borne or sustained."

I will also remark, before I proceed to the next topic, that the rights or duties which are constituent elements of a *status*, are of two kinds. 1°. Those which arise solely from the very fact or event by which the party was invested with the condition. 2°. Those which arise from that fact or event coupled with another and a subordinate fact or event. For example: The right of the husband or wife to the *consortium* or company of the other, (either against the other, or against third persons or strangers,) is a right which arises solely from the

mere fact of the marriage. But a right or interest of either in goods or land acquired by the other, is the joint result of the *causa* or fact by which the goods or land were acquired, and of the marriage itself. From that acquisitive fact, the right of the husband or wife in the goods or land, arises: By virtue of the marriage, that right or interest is so modified, that a right or interest in the same subject accrues to the other of the two parties.

Rights or duties which arise solely from the fact engendering the condition, are said to arise *ex statu immediatè*. Those which arise from the fact engendering the condition coupled with another and subordinate fact, are said to arise *ex statu mediatè*. The latter are also said to arise from those *capacities* or *abilities* which are immediate consequences of the fact engendering the condition. For without the intervention of the particular and subordinate fact, the fact engendering the condition does not engender the particular right or duty: It merely engenders a capacity or ability to take or incur a right or duty of the kind, in case a particular or subordinate fact of the kind shall happen to intervene. For example: By the marriage, the husband (according to the law of England) is clothed with a *capacity* or *ability* to acquire *choses in action* belonging to the wife. But, in order that he may really acquire, in pursuance of that capacity or ability, two particular facts, subordinate to the fact of the marriage, must necessarily intervene: namely, the acquisition by the wife of a *chose in action*, and the reduction into possession by the husband of that same *chose in action*.

Rights which arise solely from the fact engendering a condition, (or rights which arise *ex statu immediatè*,) are closely analogous (as I shall show in my next lecture) to the rights which are styled by Blackstone "*absolute* rights," and which are styled commonly "*natural* or *innate* rights."

The only difference between them is this: The former are rights which arise solely from the fact engendering a condi-

tion: the latter are rights which arise solely from the fact of the party who bears them being under the protection of the state. By some writers, accordingly, *absolute* rights, or *natural* or *innate* rights, are styled, aptly enough, "rights arising *sine speciale titulo*." The only objection to the phrase is this: that it applies to rights arising *ex statu immediatè*, as well as to those more general (and, indeed, universal) rights, which are styled *natural* or *inborn*.

A *status* is not distinguishable by this: that it consists of *various* rights or duties, (or *various* capacities or incapacities,) all of which arise from *one* investitive fact, from *one title*, or from *one* legal cause or antecedent.

According to the definition of a *status* which I now have examined, a *status* is an *occult quality* inhering in the person who bears it: Or it is an *ideal basis* on which the rights or duties, capacities or incapacities, really constituting the *status*, rest or repose.

In the chapter in the *Traités de Législation*, which treats of *États* (or of *status* or conditions,) there is the following passage:

Having said very truly, that "connaître un *État*, c'est connaître *séparément* les droits et les devoirs qui y sont réunis," Mr. Bentham goes on to ask, "mais quel est le principe d'union qui les rassemble, pour en faire la chose factice qu'on appelle un *état* ou une *condition ?*" And to the question which he thus suggests, he gives the following answer: "C'est l'identité de l'événement investitif, par rapport à la possession de cet *état*."

It may (I think) be inferred from this answer, that, in Mr. Bentham's opinion, the following are the *tests*, or *distinguishing marks*, of a *status*, condition, or person.

1. A *status* is a *set* or *collection* of *various* rights or duties, or of various capacities or incapacities to take or incur rights or duties. 2. The rights or duties which are its constituent elements, are legal effects or consequences of *one* investitive fact, of *one* title or mode of acquisition, or (in the usual language of the Roman lawyers) of *one causa* or antecedent. It is the fact of their springing from a *com-*

mon source, or the fact of their arising in common from *one* antecedent or *causa*, which makes them the collective whole, or the complex aggregate, styled a *status* or condition.

Now it certainly is true, that a *status* is a *set* or *collection* of *various* rights or duties. And it certainly is also true, that the rights or duties which are its constituent elements, are legal effects or consequences, mediately or immediately, of one and the same title or investitive fact or event. The *status*, for example, of husband or wife, is a set or collection of various rights and duties, and various capacities and incapacities: All which rights and duties, capacities and incapacities, arise from the *status mediatè* or *immediatè*: that is to say, they arisè, mediately or immediately, from the *one* fact of the marriage, or from the *one* title or *causa* by which the *status* is engendered.

But though these two properties belong to every *status*, they are not *tests* or *characters* of a *status*, or will not distinguish *status* or conditions from those rights and duties which are matter for the Law of Things.

For, first, these properties belong to every of the aggregates which are styled by modern civilians *universitates juris*: that is to say, complex sets or collections of rights or duties. And though every *status* (which is not purely burthensome) may be deemed a *universitas juris*, there are many of these universities which are not esteemed *status*; but are always inserted (and, I think, properly) in that general department of the law which is styled the Law of Things.

The aggregate, for example, of the rights and duties which passes by testament or intestacy to the general representative of a deceased person, has never been deemed a *status* or condition, but has always been considered as part and parcel of the bulk of the legal system. In the institutional writings of the Roman lawyers, in the French and Prussian Codes, and in every systematic code (or every systematic exposition of a *corpus juris*) of which I have any

knowledge, the rights and duties of heirs (or of universal successors to deceased persons) are placed in the *jus rerum* and not in the *jus personarum*. And by our own Hale and Blackstone, (the only systematic expositors of our own *corpus juris,*) the rights and duties of the executor and administrator (who are properly the *hæres testamentarius* and the *hæres legitimus* of the Roman Law) are inserted in the general department which they style *the rights of things*, and not in the special and exceptional department which they style *the rights of persons*. By Hale, indeed, in his analysis of the law, the rights and duties of the heir (who, in some respects, though not in all, is *successor universalis*) are placed, inconsistently enough, in the Law of Persons, as well as in the Law of Things.

Now the aggregate of rights and duties, which devolves by testament or intestacy to the general representative of a deceased person, has both the properties (although it never is deemed a *status* or condition) by which, in Mr. Bentham's opinion, a *status* or condition is characterized. For it is a *set* or *collection* of various rights and duties (and a set or collection extremely complex or composite). And the rights and duties which are its constituent elements, are consequences, mediately and immediately, of *one* and the *same* title: namely, of the testament, and the acceptance of the heritage by the testamentary heir or representative; or of the complex title, or complex mode of acquisition, by which the heritage, in the case of intestacy, passes to the legitimate successor.

And, secondly, the two properties, which, in Mr. Bentham's opinion, characterize a *status* or condition, are not even peculiar to those aggregates of rights and duties which are styled by modern civilians *universitates juris*. They are found in most or many of those numerous rights or duties, which, as contradistinguished to *universities* of rights and duties, are deemed *particular* or *singular*. For, as I shall show hereafter, the difference between a university or com-

plex aggregate of rights or duties, and a right or duty deemed particular or singular, is not a difference which can be described precisely, but is one of the vague differences which are styled *differences of degree.*

Most rights and duties are not in strictness singular, but are complexions or aggregates of elementary rights and duties. And the difference between a right or duty deemed *singular*, and a so-called *university* of rights and duties, merely lies in this: that the former is a less complex, and the latter a more complex lot.

Take, for example, a right, always esteemed *singular*, which is not the most complex of rights of that description: namely, the right of dominion or property in a specifically determined thing: as, a horse, a slave, a garment, a house, a field, or what not. It is manifest that the right, though deemed singular, is truly a collection or aggregate of rights of which an adequate description would occupy a bulky volume. It consists, for example, of the right of exclusive user or possession; of the right of disposing or aliening totally or partially; of rights of vindication, and other rights of action, in the event of a disturbance of any of those primary rights: Each of which rights, constituting the right of dominion, may itself be resolved into other rights which are less complex or composite.

Suppose that the thing, which is the subject of the right of dominion, is also pledged or mortgaged, and you get at a right, in the mortgagor or mortgagee, which is more complex still. For each has *jus in rem*, not less complex than the simple right of dominion, coupled with rights *in personam* availing against the other. And yet this intricate right of the mortgagor or mortgagee, is deemed a *singular* or *particular* right, and not a *university* of rights.

The two properties, which, in Mr. Bentham's opinion, characterize a *status* or condition, are therefore found in most of the rights which are deemed singular or particular; and which, in every code, and by every private expositor of

a *corpus juris*, are placed in the general department styled the Law of Things. In the case of every right deemed particular or singular, (excepting the elementary rights, which, in the last result, are the constituents of all others,) the right, in truth, is not particular or singular, but, like a *status* or condition, is a collection of various rights: which various rights, like the rights and duties that are constituent elements of a condition, are consequences, mediately or immediately, of *one* title or antecedent.

I have remarked above, that the rights or duties which are constituent elements of a *status*, are commonly divisible into two kinds: 1st, those which arise immediately or directly from the paramount and more general title which engenders the *status*: 2dly, those which arise mediately from that paramount and more general title, through subordinate and more special titles.

And, at the first glance, I imagined that this was the distinguishing mark of a *status* or condition. But I am not sure, that *every* set of rights or duties, deemed a *status* or condition, is divisible in that manner. And I am quite sure, that universities of rights and duties not deemed conditions, with sets of rights or duties deemed particular or singular, *are* divisible in that manner: that is to say, some of the rights or duties composing the aggregate or set, arise immediately from a paramount and more general title by which the aggregate or set is itself engendered: whilst others arise mediately from that paramount and more general title, through surbordinate and more special titles.

For example: All the rights and duties of the English executor (who, as universal successor, has properly *juris universitas*) arise, in a certain sense, from *one* complex title: namely, the will and probate. But some of his rights and duties arise immediately and directly from that his paramount and more general title: whilst others are not engendered by that paramount and more general title, with-

out the intervention of secondary and more special titles. Such, for example, are rights arising from a contract into which the executor may enter, touching the effects of the testator; or a right of action arising from an injury done to him in his character of executor, and not arising from an injury done to the deceased.

And the rights which are constituent elements of the right of dominion or property, (always deemed a singular or particular right) are divisible in the same manner. Some arise from the conveyance, (or from the other title by which the dominion is acquired,) immediately or directly. But others arise from the title by which the dominion is acquired, through the intervention of a secondary or more special title. For example: The right of dominion comprises (amongst numerous other rights) a right of vindication: that is to say, of restoration to the exercise of the right of dominion, if the exercise be prevented by eviction or hindered by any disturbance. But before the right of vindication can completely accrue to the *dominus*, he must be evicted from the possession, or otherwise disturbed in the enjoyment.

A *status* is not distinguishable by this: that the party bearing the *status* has *jus in rem* in its constituent rights.

A person clothed with a condition, or bearing a person or character, has *jus in rem* (or a right availing against the world at large) in the complexion or aggregate of the rights which are constituent elements of the *status*.

At first I imagined that this might distinguish a *status*, from the set of rights or duties which are not *status*. But, for various conclusive reasons, I am convinced that this *jus in rem* over the *status* itself is not a character or distinguishing mark by which we can determine what a *status* is.*

The *jus in rem* over the aggregate of the rights which are constituent elements of a *status*, is therefore not a character, or a distinguishing mark, by which we can distinguish *status* or conditions from the sets of rights or duties which are not *status* or conditions.

* See Note on *Status*, Table II. head 3.

For, 1st, in purely onerous conditions, the mark is *not* to be found: a right to a burthen, or to vindicate the enjoyment of a burthen, being an absurdity.

And 2dly, the mark *is* to be found in universities of rights, which have never been deemed conditions or *status*, but have been placed by common consent in the Law of Things. Such, for example, are the universities or complex aggregates of rights which reside in the universal successors to testators and intestates.

3dly, I almost incline to think that the same mark may be found in many of the sets of rights which are deemed singular or particular. *E. g.* Right of dominion would seem to import a right in the set or collection of rights into which dominion may be analyzed. When the owner vindicates his possession he reinstates himself in the enjoyment of many separate rights. And what more is done by an action *ex statu*, or by any other action founded on a *juris universitas*?

But to this consideration I must revert hereafter, and will not pursue it here.

The law of persons is not concerned with *the differences between persons.*

In an excellent treatise on *Jus personarum et rerum*, which occurs in his "*Versuche*" or Essays, Mr. Thibaut of Heidelberg states the import of the distinction in the following manner:*

He says that the department of the *corpus juris* which is styled *jus personarum*, is concerned with *the differences* between *persons*: whilst that department of the *corpus juris* which is styled *jus rerum*, is concerned with all other matters about which law is conversant, and more especially about things incorporeal, or about rights and duties. This account of the distinction accords exactly or nearly with that account of it which I gave in my last lecture.

But I think it will not enable us to determine with precision, the subject or matter of the law of persons.

* Thibaut, "Versuche," etc., Ueber j. p. et r. pp. 5. 6. 7. 9. 21.

When he says that this department is concerned with the differences between persons, he means by the term "persons," *homines*, or human beings, or he means *status* or conditions. If he means *status* or conditions, he is right in saying that the Law of Persons is concerned with differences between persons: for it is concerned with describing and distinguishing the various *status* or conditions. But this leaves the main difficulty untouched. For why are the sets of rights and duties, which are detached from the bulk of the legal system and styled *status* or conditions, so detached in preference to others? Or, in other words, what is the common mark which severs the so-called *status* from the sets of rights or duties which have not been treated as such?

And if he means by persons, *homines* or human beings, the same difficulty presents itself in a somewhat different form. It is manifest that those *differences between persons*, which occur in the science of jurisprudence, (or those *classes of persons* which occur in the science of jurisprudence,) are entirely founded on differences between the rights and duties, with and to which, persons, as meaning men, are invested and subjected: or, what comes to the same thing, they are founded on those differences between the facts and circumstances touching or concerning persons, which make it necessary to determine differently certain of their rights and duties. Whence, for example, the *class* of infants, or the *difference* between infants and other classes of persons? Why, clearly from the rights, duties, and incapacities, which are peculiar to infants: or, what comes to exactly the same thing, from that youth and inexperience, incident to infancy, which renders it necessary to arm and protect infants with those peculiar rights, duties, and incapacities.

This is admitted by Mr. Thibaut himself: who says, "The Law of Persons is concerned with differences between persons: not, however, absolutely; but only in so far as

the differences between persons influence their rights and duties."

Now, as I remarked in my last lecture, there is no right residing in several persons, and no duty incumbent upon several persons, which might not be made the basis of a class of persons. Every right or duty (excepting a right or duty peculiar to a specifically determined individual) might determine the persons clothed with it, or the persons subject to it, to a kind or sort. Insomuch that the possible classes of persons, are as numerous as the possible differences between rights and duties.

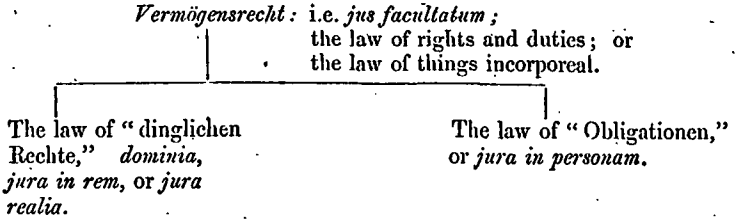
Why, then, are only certain classes of persons made the subjects of the Law of Persons? Or, (what is the same question put in another form,) why are certain sets of rights and duties inserted in the Law of Conditions, whilst others are not deemed conditions, and are not detached from the bulk of the legal system?

Mr. Thibaut may probably mean, that the Law of Persons is not concerned properly with *status* or conditions, but only with the titles or facts by which *status* or conditions are invested and divested: the description of *status* or conditions, or of the rights or duties which are their constituent elements, being remitted to the Law of Things. This question, on which I touched in my last lecture, I shall examine in my next.

Mühlenbruch, D.P., vol. ii. p. 11.
Bentham, Traités, vol. i. p. 294, 5.
Note to Table II., in princ.
Falck, pp. 47, 48.

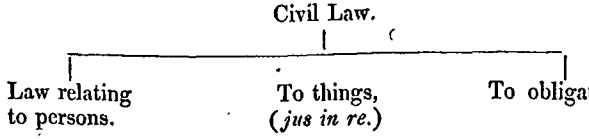
Notes.

For Von Savigny's conception of the order or method which is observed by Gaius and Justinian in treating the Law of Things, see *Vom Beruf*, p. 66.


Vermögensrecht: i.e. jus facultatum;
the law of rights and duties; or
the law of things incorporeal.
The law of "dinglichen Rechte," dominia, jura in rem, or jura realia.
The law of "Obligationen," or jura in personam.

The two passages in his *Vom Beruf*, pp. 98 and 66, are unfortunately the only parts of his works in which Von Savigny has intimated his opinion concerning the method of the Institutes.* —See *ante*, p. 382.

The legal relations between private persons, apart from the political sanctions by which those relations are maintained, is the subject-matter of Civil Law.



The consideration of these branches of Civil law, should be preceded by a review of the various *Status* or Conditions: *i. e.* of the different *capacities* of different members of the society; or in other words, of the varying clusters of rights and obligations of which they are severally *susceptible*.

* These lectures were written before the publication of Mr. von Savigny's "System des heutigen römischen Rechts," in which this subject is discussed. See vol. i. § 59, p. 393.

Amongst the ancients the distinctions between the various conditions were much broader than amongst the moderns; with whom almost every legal incapacity is founded upon a corresponding physical one.

Of the various conditions or *status*, some are the creatures of government; others would exist without government; although the rights and obligations of which they severally consist would in that case be merely moral.

These various conditions constitute the subject-matter of the law which relates to persons; although it is more especially conversant with domestic or quasi-domestic conditions.—*Marginal Note in Falck*, p. 48, C. I. § 27.

Das Personen-Recht soll von den Verschiedenheiten der Personen handeln; aber natürlich nicht unbedingt, sondern nur sofern, als diess auf die Verschiedenheit der Rechte und Verbindlichkeiten Einfluss hat. Das Sachenrecht soll von Sachen handeln, und muss wieder in zwei Theile, Lehre von den Körperlichen, und Lehre von den unkörperlichen Sachen, zerfallen. Zu dem letzten Theil gehört das ganze Materie von den Rechten und Verbindlichkeiten, weil diese Arten der unkörperlichen Sachen sind. Das Personen-Recht soll sich also mit allen dem Juristen wichtigen Verschiedenheiten der Personen, welche keine Rechte und Verbindlichkeiten sind, beschäftigen; das Sachenrecht mit Sachen, und besonders mit der einen Art derselben, den Rechten und Verbindlichkeiten.—*Thibaut*, "Versuche über einzelne Theile der Theorie des Rechts." (*Ueber jus personarum et rerum.*) Vol. ii. p. 7.

LECTURE XLII.

In the Lecture before the last,* I explained or suggested the import of the distinction between the Law of Persons and the Law of Things: Meaning by "the law of persons," the law of *status* or conditions, or the law of persons as denoting *status* or conditions: And meaning by "the law of things," the bulk or mass of the *corpus juris* as abstracted from *status* or conditions, or *the* Law *minus* the law of *status*.

That such (stated generally) is the import of this celebrated distinction, appears from the short exposition of it which I then gave, and also from the passages from Von Savigny and Thibaut, which I read in my last lecture.

Having stated the import of the distinction in question, and adverted to the idea of *status*, (which is the basis of the distinction,) I proceeded to examine certain definitions of the distinction and of the implied idea of *status*, which, in my opinion, are erroneous or defective, and have engendered much of the obscurity wherein the idea and the distinction are involved.

I now proceed to a definition of *status*, which, in my opinion, is not less erroneous than any of the various definitions that I examined in my last lecture.

A *status* is a capacity, (*facultas*, or *Rechtsfähigkeit*).†

According to the definition of a *status*,‡ to which I now am adverting, a *status* is a *capacity* or *faculty:* For in the language of modern

* The Lecture alluded to is the one which is missing (see p. 380).

† Thibaut, System, vol. i. p. 160.

‡ Namely, that contained in Thibaut's System.

Civilians, (and of all modern jurists whose terms are fashioned on the language of modern Civilians,) the term *faculty*, though commonly denoting *a right*, also signifies *a capacity* or *ability* to take or acquire a right, or to incur, or become subject to, a duty. In the language of the German jurists, who adopt the definition of a *status* to which I now am adverting, a *status* is denominated *Rechtsfähigkeit*: literally or strictly, a capacity or ability to take or acquire *a right*; but meaning a capacity or ability to take or acquire a *right*, or to incur, or become subject, to *a duty*. For, amongst the numerous ambiguities by which the German "*Recht*" (like the Latin "*jus*") is perplexed and obscured, is this: that, though it signifies *a right*, it occasionally embraces in its comprehension, *a duty*. For example: To succeed "in omne *jus* defuncti," is to succeed, by universal succession, or *per universitatem*, to all the descendible duties, as well as to all the descendible rights, of the deceased testator or intestate.

A capacity or ability.

Before I remark on the falsity of the definition to which I now am adverting, I will briefly consider the nature of *a capacity*, or, as Hale and others of our writers also style it, *an ability*.

A person is *capable* of a given right, or is *capable* of a given duty, if, on the happening of a given event, the law would invest the person with that given right, or would impose on the person that given duty. A person is *incapable* of the given right or duty, if, on the happening of the given event, the law would not invest him with the given right, or would not impose upon him the given duty. A slave, for example, is incapable of acquiring property, by conveyance for valuable consideration, free gift, descent, or otherwise. A freeman is capable of acquiring that right, by those or other means. An alien, by the law of England, is incapable of taking land by conveyance for valuable consideration, or otherwise. A native is capable of acquiring it, by that, and

other modes of acquisition. An adult, speaking generally, is capable of incurring a duty, through an agreement to which he is a party. An infant, speaking generally, is incapable of incurring a duty, through an agreement to which he is a party.

It is manifest that the terms *capable* and *incapable* must be taken with relation to the given investitive fact, as well as to the given right or given duty. For a person incapable on one event, of a given right or duty, may be capable of the right or duty, on the happening of another. We may conceive, for example, that an infant, though incapable of binding himself by a naked contract, might be capable of binding himself by a contract of the same kind, if, to prevent fraud, it were clothed with certain solemnities. Though incapable of incurring a given duty by the contract alone, he yet might be capable of incurring that very same duty, by that very same contract coupled with other incidents.

The term *capacity* or *incapacity* is the abstract of the term *capable* or *incapable*. To have a capacity, is to be capable: and to be capable, is to have a capacity. Although a capacity is not of itself a right, a person may have *a right* in *a capacity to acquire a right*. Certain *status*, for example, are partly composed of capacities to take rights, as well as of actual rights: as others are composed, wholly or in part, of incapacities to acquire. Now, by the modes, direct or oblique, to which I adverted in my last lecture, a person may assert or vindicate a *status* of the former kind, or may repel a *status* of the latter. In either of which cases, he reinstates himself in certain capacities as well as in certain rights. A person, for example, who is unlawfully treated as a slave, may repel the *status* of slave, by an action, and so recover the capacities which belong to him as a freeman.

And here I would remark, that the term capacity or ability, or incapacity or inability, can hardly be used, with

perfect propriety, in relation to a duty. *A capacity or incapacity to incur or become subject to a duty*, certainly sounds harshly. Consulting mere propriety of speech, I should rather style it *liability* to a duty, or *exemption* from a duty. But I use the term in relation to a duty, as well as in relation to a right, for the sake of the conciseness which thence results. You will find, on making the experiment, that, if you use one name for a capacity to take a right, and another name for a capacity to incur a duty, you will often be forced to express yourself, when speaking of the capacities jointly, in sentences of suffocating length. And in giving to "capacity," the common or generic meaning with which I employ the term, I am justified by the similar use of the equivalent term "faculty," which is made, as will appear immediately, by authors of good repute.

A similar difficulty arises with regard to the term "title," and the term "mode of acquisition." We can hardly say, with propriety, that a duty arises from a *title*, or that a duty is *acquired*. But yet we want a name for those facts or events to which duties or obligations are annexed by the law. For we may have occasion to speak of the origin of a relative duty, as abstracted from the origin of the corresponding right: not to mention, that many duties are absolute. To obviate this difficulty, Mr. Bentham adopts the term "investitive fact or event," and uses it as a common or generic expression: that is to say, as denoting *any* fact, to which the law annexes a right *or* duty. Perhaps he would have done better, if he had ventured to use "title" in the same generic sense, or had adopted the "*causa*" of the Roman Lawyers.

Subject of a right.

As not unconnected with the present matter, I will here make a remark which may be very convenient to those who may happen to look into German books in anywise concerning law.

When I speak of the subject *of* a right, I mean not the

person in whom the right resides, but the thing (strictly so called), or the person, over, in, or to which, the person entitled has the right: Supposing (I mean) that the right be of the rights which are rights to things or persons. For an *obligatio*, or *jus in personam*, is not a right *to* a thing or person, but to acts or forbearances *from* a person: And even many of the rights which avail against the world at large, are not rights *to* persons or things, but merely rights to forbearances from persons generally.

But in the language of the German jurists, the *subject of* a right, is the person who has the right, or in whom it resides. And they employ the term *subject* in the same manner, not only with regard to rights, but with regard to duties, capacities, and incapacities. In their language, the party who has the capacity, or who lies under the duty or incapacity, is the *subject* of the same.

For various reasons, it appears to me, that my own use of the term is the usual one, and is justified by many analogies. With these reasons, I will not trouble you. But I will add to the explanation which I now have given, that this their use of the term *subject*, partly accounts for an absurdity of theirs to which I have alluded in my published lectures.*.

Now I think it extremely probable, that they were led into this strange jargon by that use of the term *subject* to which I have referred. Inasmuch as the person having *a* right is the *subject* of the right, the term *Recht*, as meaning *a* right, must (they fancied) have something to do with the *subjectivity* of Kant: And, of course, the opposed *Recht* which means *law*, must also (they fancied) have something to do with that *objectivity* which Kant contradistinguishes to *subjectivity*.

It is manifest that the terms are completely misapplied. In the Kantian language, *subjective* existences are either parcel of the understanding, or ideas which the understand-

* See Vol. I. p. 258.

ing knows by itself alone. They are pretty nearly, if not exactly, the "ideas gotten by reflection" which are opposed by Locke to "ideas gotten by sensation." And in the language of Kant, that exists *objectively*, which lies without the understanding, or which the understanding knows by looking beyond itself.

Now, admitting all this jargon, it is clear that the two terms, *objective* and *subjective*, are not applicable respectively to *law* and *rights*. For, though a right *resides* in the person, and so may be analogous to subjects of consciousness, most of that which a right necessarily implies, is, as to the person, *objective*. The law giving him the right, (which, according to themselves, is objective,) together with the relative duty which the law imposes upon others, are not *in* him, or *parcel* of him, but are as completely external to him, as an object of sensation is external to the percipient mind.

It is really lamentable that the instructive and admirable books which many of the German jurists have certainly produced, should be rendered inaccessible, or extremely difficult of access, by the thick coat of obscuring jargon with which they have wantonly incrusted their necessarily difficult science.

[I ought to have remarked, that Blackstone has been misled by the double meaning of *jus*: and that hence, partly, his inane talk (worse than any jargon of the Germans) about the *rights* of persons and things, and the respective subjects of those two departments of law.]

A *status* is a capacity, etc.

From this digression concerning capacities and incapacities, I revert to the definition of a *status*, which is the proper subject of the present examination.

According to that definition, a *status* or condition, or a person as meaning a *status* or condition, is a capacity or ability to take rights, or to incur or become subject to duties, which the law confers or imposes upon the person,

as meaning the *homo* or man. In Mühlenbruch's *Doctrina Pandectarum*, the definition is given thus:

"Personam (quæ quidem a personando dicitur) potestatem juris vocamus; sive facultatem et jurium exercendorum et officiorum subeundorum, hominibus jure accommodatam et velut impositam. Ex quo intelligitur, quid sit, quod persona abjudicetur iis, qui aut prorsus nullo aut valde imperfecto gaudeant jure, etc."*

According to a definition of *jus personarum*, which is equivalent to the above definition of *persona* or *status*, the law of persons is concerned with the *capacities* of persons (as meaning men) to take rights or incur duties: or it is concerned with persons (as meaning men) in so far as they are *capable* of rights or duties.

This definition of *status* (with the equivalent definition of *jus personarum*) is liable to the following, amongst other, objections.

1st. There are capacities which are common to *all* persons, who either completely, or to certain limited intents, are members of the given society political and independent, or subjects of its sovereign government. Every person, for example, whether free or slave, citizen or foreigner, adult or infant, married or unmarried, trader or not trader, has a capacity (unless he be excluded completely or nearly from all legal rights) to purchase and acquire property in such outward things as are necessary to the sustenance of life. Granting, then, that a condition *is* a capacity, its being a capacity will not serve to *characterize* it; seeing that there are capacities which are not conditions. A condition regards specially persons of a given class, and cannot consist of aught which regards indifferently all or most classes.

2dly. There are many conditions which consist mainly, not of capacities, but of *incapacities*. The condition, for example, of the slave, consists mainly of incapacities to take

* Mühl. vol. ii. p. 1.

rights: The condition of the infant freeman, of incapacities (mainly or wholly imposed upon him for his own benefit) to take certain rights, and incur certain duties. Nay, there are, I believe, conditions (though I cannot recollect, at the moment, a condition of the kind) which consist *entirely* of disabilities: of incapacities to acquire certain rights of which persons generally are capable; or of exemptions from certain duties to which persons generally are liable.

3dly. As I remarked in my last Lecture, and shall explain a little more fully hereafter, the rights or duties, which as well as capacities or incapacities, are of the constituent elements of most conditions, are divisible into two kinds: namely, rights or duties which arise from the *status immediatè*, and rights or duties which arise from the *status mediatè*. In other words, of the rights or duties which are constituent elements of the condition; some arise solely and directly from the general and paramount fact which engenders the condition: whilst others arise from that general and paramount fact, through a particular and subordinate fact. For example: the right of the husband or wife to the *consortium* or company of the other (either as against the other, or as against third persons generally) arises directly and exclusively from that fact of the marriage which clothed the husband and wife with their several but correlating *status*. But a right or interest of either in goods acquired by the other, arises from the fact of the marriage, through the title or *causa* by which the goods are acquired.

Now the rights or duties which arise from the *status mediately*, (or from the fact engendering the *status*, through a subordinate fact,) are consequences of *capacities* which are parcel of the *status*, and which arise directly from the fact engendering the *status*. But the rights or duties which arise from the *status immediately*, (or which arise directly from the fact engendering the *status*,) are *rights* or *duties*, and not *capacities* or faculties "*jurium exercendorum et offi-*

ciorum subeundorum."—Wherever, therefore, the constituents of a *status,* are divisible in the manner which I have now suggested, (and the constituents of most *status* are so divisible,) the *status* is not a capacity, or a bundle of capacities, but an aggregate of rights or duties *with* capacities:

Tria capita. I remarked in a former lecture, that there are certain pre-eminent *status* which the Roman Lawyers seem to have distinguished from others by the name of *capita:* namely, 1st, *status libertatis* (or the condition of the freeman, as opposed to that of the slave); secondly, *status civitatis* (or the condition of the Roman citizen, as opposed to that of the foreigner); and, thirdly, *status familiæ:* that is to say, the condition of being a member of a given family, and as such enjoying certain rights, or being capable of certain rights. For example: Unless a person were a member of a given family, he could not take by succession *ab intestato* from any member of that family. And, by consequence, when a man was adopted by the head of another family, or when a woman married and thereby became a member of her husband's family, the *status familiæ* (with reference to the family quitted) was lost: though a new *status familiæ* (in reference to the family entered) was at the same time acquired.

Now a definition of *caput* (resembling the definition of *status* which I have just examined) is given by many German civilians. They say that a *caput* is a condition precedent (*Bedingung*) to the acquisition of rights: which merely means (if it mean anything) that a *caput* comprises capacities to acquire rights.—The definition, therefore, is liable to one of the objections which I made to the definition of a *status* that I have just examined. A *caput,* indeed, comprises capacities; and, in so far as it comprises them, is a condition precedent to the acquisition of rights. But it comprises rights and duties arising from the *status immediatè,* as well as mere capacities to take and incur rights

and duties on the happening of particular and subordinate facts.

I remarked, in a former lecture, (when explaining the various meanings of the term *person,*) that a certain absurd definition of the term person as meaning *homo*) arose from a confusion of *caput* and *status:* from a supposition that the Roman lawyers limited the term *status* to those peculiar *status* which they called *capita.* I remarked that those three *status* were probably called *capita,* (or capital or principal *status,*) because they comprised extremely numerous and important rights and capacities; and because the want of them implied extremely numerous and important incapacities.

Unless, for example, a man was free, (or had the *status libertatis*) he was excluded from all rights, and was only subject and liable to duties. Unless he was a Roman citizen, he was excluded very generally from rights, though not from all. Unless he was an *agnat* of a given family, he was excluded, in regard to that family, from the weighty right of succeeding to its members *ab intestato.*

But that the Roman lawyers limited the term *status* to these three *capita,* is utterly and palpably false. They speak, for example, of the *status* of a slave, who had not, and could not have, *caput:* the want of liberty implying a want of citizenship, and also of relationship to a family of Roman citizens. They also speak of the *status* of a *peregrinus* or foreigner: of the *status* of a senator: of the *status lesæ existimationis,* or of a *status* consisting of certain incapacities consequent on having been noted or branded by the censors. In a note upon *status* which I have appended to my second Table, I refer to various places in the Institutes and Digests, wherein the term *status* is applied to many sets of rights or duties, or capacities or incapacities, which could not have been deemed *status,* if the term had been restricted to *capita.*

But there is one consideration which is quite conclusive.

In the first book of Gaius' and Justinian's Institutes, *peregrini* or foreigners, *libertini* or freedmen, masters and slaves, fathers and children, husbands and wives, guardians and wards, with other classes of persons, are passed in review: And to the whole book, regarding specially these various classes of persons, the common title of *de personis* (and, in Gaius, the title of *de conditione hominum* also) is prefixed.*

Before I dismiss this subject, I would remark, that the *tria capita* are not properly *status*.†

To describe the rights, etc. of a freeman and citizen, is to describe generally the matter of the Law of Things. For a freeman and citizen (except in so far as he is excluded by special incapacities) is capable of the rights and duties with which the Law of Things is properly concerned. To put the rights and duties of a freeman and citizen into the Law of Persons, were to repeat under a head of the Law of Persons the whole matter of the contradistinguished department.

You will find, accordingly, (if you examine any systematic code, or systematic exposition of a *codex juris?*) that, although freemen and citizens are distinguished from slaves and strangers, their rights and duties are not considered in the Law of Persons. Their rights and duties are defined negatively by the definitions of the incapacities which are incumbent on slaves and foreigners. If a man be free and a citizen, he is capable (speaking generally) of all the rights and duties of which a slave and foreigner is incapable, and also of all others contained in the Law of Things.

If you look into the tenth chapter of his first book (entitled "Of the People, whether Aliens, Denizens, or Natives") you will find that Sir William Blackstone passes over the

* Inst. I. 3. Gaius lib. i. § 8.

† Blackstone, vol. i. 371.

rights of native-born subjects "*as being the principal subject of his whole treatise:*" though he considers the incapacities of aliens; inasmuch as they regard specially a comparatively narrow class, and therefore are fit matter for that exceptional department which is styled the Law of Persons.

I apprehend, therefore, that the rights, etc. of a freeman and citizen are not properly a *status*: meaning by a *status*, (the only meaning which I can possibly attach to it,) a set of rights and duties, specially regarding persons of a given class, which, for the sake of a convenient arrangement, it is expedient to detach from the body of the legal system.

It cannot, however, be inferred from what I have now said, that the Law of Things contains the rights, etc. of a citizen and freeman: or, in other words, that it relates to the *status* of a citizen and freeman. For a citizen and freeman may bear many *status* which consist of rights or incapacities peculiar to certain classes of citizens. An infant citizen, for example, or a citizen who is guardian, is clothed with peculiar rights besides those which are matter for the Law of Things, and is subject to peculiar incapacities which disable him from taking some of the rights with which the Law of Things is concerned.

A mistake similar to that against which I have offered this caution, is made by *M. Blondeau* (the *Doyen* of the Faculty of Law at Paris) in his excellent analytical Tables of the Roman Law. He divides the *corpus juris*, into law concerning "*capables*," and law concerning "*incapables*": meaning by a "*capable*," a Roman citizen *sui juris* and not in wardship; and by "*incapables*," all who are incapable of more or fewer of the rights of which a Roman citizen *sui juris* is capable. His law, therefore, of *capables*, is pretty nearly the Law of Things considered as an exposition of the rights, etc. of a freeman and citizen. But this division, though extremely specious, is false and defective. There is no class of persons who are absolutely *capables*, although some are subject to fewer incapacities than others. Nor per-

haps are there any who are absolutely *incapables*, although the incapacities of some are comparatively numerous.

It is also manifest that a Roman citizen *sui juris*, must bear many characters or many *status*: in respect of each of which, he has peculiar rights and duties, or peculiar incapacities: as, for example, the character of magistrate, guardian, patrician, plebeian, etc. And how can these peculiarities find a place in a department which is concerned *generally* with Roman citizens *sui juris?*

[The *status familiæ* not a *status*, but is considered *in jure rerum*. *v. v.* Natural and civil *status*. All *status* civil. Point out Heineccius's inconsistency, in the passage about *caput* and *status*.*]

The true nature of the idea of *status*, and of the distinction between j. p. et j. r., resuggested.†

Having examined various definitions of the idea of *status*, and of the distinction founded on that idea, I will now offer a few suggestions which may perhaps conduct the hearer to their true nature.

Though the rights, etc., which are constituent elements of a condition, are peculiar to the class invested with conditions of the kind, it is not true (*e converso*) that the rights, etc., which are matter for the law of things, are common to persons of all classes, or reside in or are incumbent upon all.

For example: All are not contractors, mortgagees, or mortgagors, purchasers, etc. Nay, some *status* consist exclusively, or consist partly, in incapacities to take or incur the duties which are matter for the law of things.

When, therefore, I said in a former lecture, that the Law of Things is to the Law of Persons, as the genus is to the species under it, the expression must be taken with the modification now suggested.

An expression more nearly approaching to the truth is this: That the rights, etc., which are matter of the Law

* Heineccius, p. 52. See end of Lecture.

† Reference to missing Lecture.

of Things must be taken into consideration before we can understand the rights, etc., which are constituent elements of any given *status:* Whereas, the rights, etc., which are constituent elements of any *status,* need not (generally speaking) be taken into consideration, in order to an understanding of the Law of Things. They have no necessary coherency with the bulk of the legal system, and may be detached from it without breaking its continuity. This is one principal reason for detaching it: for it does not break continuity, and renders the exposition of the bulk of the system more compact and coherent.

The first reason (namely, that the matter of the law of things must be taken into consideration in order to a right understanding of almost any *status*) will account for the difficulty which I suggested the other night; namely, that certain sets of rights and duties which would seem to regard specially comparatively narrow classes, are placed, nevertheless, in the Law of Things. They have such a coherency with the bulk of the legal system, that if they were detached from it, the requisite continuity in the statement or exposition of it would be lost.

E. g. The rights, etc., of heirs, and other representatives of the deceased: Without an explanation of these rights, many rights of general interest, and apparently of an elementary kind, could not be understood.

Or again, A right of unlimited duration (as contradistinguished from one of limited duration), etc., could not be understood without an explanation of the law of succession.*

It is true, then, generally, that the matter of the law of things must be taken into consideration, before we can understand the rights, etc., which are elements of any given *status.* Whereas, the matter of any *status* need not be taken into consideration, in order to an understanding of the Law of Things.

This last is, however, not true universally. For the matter

* See Note upon *status* in Table II., *sub fine.*

of many sets of rights, etc., deemed *status*, must be taken into consideration partly, in order to an understanding of the Law of Persons. (*E. g.* Marriage, in order to understand Succession.) There are more *præcognoscenda* (as I shall observe hereafter) in the Law of Things: but still there *are præcognoscenda* in the Law of Persons. In these cases, the *status*, though partly coherent with the bulk of the system, is mainly detached for another reason: namely, assembling rights, etc., of a class under one head.

[Remarkable instance of this in the insertion of *jus familiæ* in the Law of Things.]

In order to expound succession, it is necessary to refer forward, to husband and wife—parent and child—and even master and servant; because out of these classes, successors *ab intestato* are generally taken; and in order to explain the capacities of other persons to succeed, it is necessary to treat of consanguinity: which involves the two first relations. But this is no reason for expounding the *status* of these classes *à propos* of succession. Nor indeed is it by virtue of *status*, that these classes succeed. *Any* of them are capable of succeeding; whereas *status, ex vi termini*, is peculiar to one class—and the Law of Persons is only conversant with *status* (or at least ought to be), even according to the intention of the Roman Lawyers. Because it is impossible to explain a common capacity, without referring to a certain class, does that common capacity become peculiar? Procedure implies some consideration of the sovereign authority. But is that a reason for expounding all political *status à propos* of procedure? By the Germans and Blondeau, Family Law, etc., is placed just before Succession:* which is wrong: because it is only connected in a few respects with the bulk of the legal system; and therefore reference would do.

On the whole, the two principal reasons for detaching sets, etc., from the body of the legal system seem to be these.

* Hugo, Enc., pp. 74, 308.

1st. That the rights, etc., constituting the *status*, regard specially a comparatively narrow class of the community: and that it is convenient to have them got together for the use of that class.

2dly. That they can be detached from the bulk of the system without breaking the continuity of the exposition. And that the so detaching them, adds to the clearness, etc., of the exposition.

And therefore, if to state them would break much continuity of exposition, these rights are left in *jus rerum*, though specially regarding a narrower class.

Where the two conditions concur, the two objects which I pointed out in the last lecture are accomplished; *i.e.* 1. assemblage of rights, etc., under a common head: 2. relief of general exposition from special matter. I will not say that these are the only reasons, but they are the principal.

In practice, it has not been usual to detach them, although both conditions concur (*i.e.* though the rights be peculiar to a comparatively narrow class, and though detachable without breaking continuity) if the rights, etc., are few in number and unimportant.*

But this is illogical and unsystematic. Where a set of rights, etc., is so detached (for those conveniences of arrangement which I have now suggested) the set is called a *status*. And this, it appears to me, is the whole rationale of the matter. Though, such is the pother made about *status*, that nothing but a most laborious inquiry into the subject could convince me that there was not more in it.

It is difficult to state the distinction, because it is a distinction suggested by considerations of arrangement, and therefore vague. But the distinction is not therefore useless, because not precise; and the same objection applies to most attempts at classification and arrangement.

It is important to explain it fully, on account of the ex-

* Blondeau, VII. XI.

treme obscurity in which it has involved the science of jurisprudence.*

This distinction, too, with that of *jus in rem* et *jus in personam* (or delicts and obligations) is the principal key to the necessary structure of Law.

I must here explain an apparent inconsistency. In my Outline, I say that the idea of *status* is a necessary one; and I said the same in my last lecture. And yet I say that a *status* has no certain mark, and that the distinction between *jus personarum* and *jus rerum* is merely adopted for the sake of a convenient arrangement.

My explanation is this: That the differences (though not perfectly precise) which suggested the distinction, do exist in every system.

In every system there are rights, etc., which concern specially comparatively narrow classes, and which can be detached from the bulk of the system with little or no inconvenience.

In every system, there are also rights, etc., of a more general interest, or which it were impossible to detach from the bulk of the system without breaking its coherence and continuity.

There are therefore reasons in every system for adopting the distinction, although it may not be described precisely alike in any two systems. That this is true, is proved by its almost universal adoption.

[Mr. Bentham arrived at it instinctively, although he had rejected it.

Meaning of a "comparatively narrow class:" One which actually is comparatively narrow, though potentially as broad as another. Proprietors, contractors, etc., (taking terms in largest sense,) more numerous than husbands, wives, infants, etc.]

* Instances of which are to be found in the definitions examined in my last and present Lectures. Refer to extreme absurdities of Sir William Blackstone. See his Table.

NOTES.

Blondeau's terms suppose that the persons whom he calls "*Incapables*" are distinguished from those whom he calls "*Capables*" only by incapacities.* But this is an error. *Both* are capables *and* incapables: each is capable (i. e. *would* acquire certain rights etc. and be *subject to certain obligations* etc. on the happening of certain incidents) of rights and obligations of which the other is incapable; and each is incapable, etc.—Capacity and Incapacity, therefore, cannot be made the basis of this distinction.

Excluding special and political *Status* as he does, *the Law of Capables is with him equivalent to the Law of Things;* for it includes all the rights etc. which regard the other classes; and *patres-familias* (being considered apart from the modifications which special *status* etc. might work upon their private rights) may be said to be *capable* of *all* these rights. The division, however, in truth, is a division into *patres-familias,* and those who are not; *patres familias,* in abstract, being *capable* of all etc.

The rights and obligations of capable persons, are those, which, though not *belonging to* every *status,* must be taken into consideration *with reference to* every *status.*

Besides, many of the elements of many *status* are not incapacities, but rights or powers not possessed by other classes: e.g. tutor or guardian, magistrate, etc.

Perhaps there is no man a "Capable;"—if by capable be meant a person invested with all the rights and capacities, and subject to all the obligations which are described, or ought to be described, under the Law of Things; certainly there is no one who is capable of *all* the rights and obligations which are described in both departments. It may be said of a man that he is not subject to *this or that* incapacity or *this or that* exemption; but it can hardly be said of him that he is free from all, or susceptible of none. In fine, *everybody belongs to some class.*

Tria capita.†

Quæritur itaque, Quid sit Status? Resp. Esse qualitatem, cujus ratione homines diverso jure utuntur, e. g. quia alio jure utitur liber homo, alio servus, alio civis, alio peregrinus; hinc libertas et civitas dicuntur status. Vocatur alias status in jure

* See p. 411 (*ante*).

† See p. 408 (*ante*).

nostro, *caput*. Status Jurisconsultis duplex est, *naturalis et civilis*. Naturalis est, qui ab ipsâ naturâ proficiscitur, e. g. quod alii sint masculi, alii feminæ, alii nati, alii nascituri vel ventres. *Civilis* est, qui ex jure civili descendit, uti differentia inter liberos et servos, cives et peregrinos, patres et filios-familias. Hinc *status civilis* triplex est; *libertatis*, secundum quam alii sunt liberi, alii sunt servi; *civitatis*, secundum quam alii cives, alii peregrini; et denique *familiæ*, secundum quam alii patres-familias, alii filii-familias. Jam ergo facile intelligitur axioma: quicumque nullo horum trium statuum gaudet, is non est *persona* secundum jus Romanum, *sed res, quamvis homo sit*.—*Heineccius, Recit.* p. 52.

Hominum jura civilia quæcunque sunt, tribus hisce tanquam involucris continentur: libertate, civitate, familiâ, qui quidem *status* appellantur.—*Mühlenbruch, D. P.*, vol. ii. §. 214.

Die bürgerliche Rechtsfähigkeit ist das, was die Römer *caput* oder *status* nennen. Die Neueren nennen sie dagegen, verbunden mit allen durch die Gesetze erzeugten Eigenschaften, wovon einzelne Rechte abhängen, *status civilis*: die natürliche Rechtsfähigkeit hingegen, verbunden mit physischen Eigenschaften, welche besondere Rechtsverhältnisse zur Folge haben, *status naturalis*.—*Thibaut, System*, vol. i. § 3.

Mr. Bentham (misled by Blackstone and others) treats the distinction of *jus personarum et rerum* with great contempt; asking (and justly enough) how *things* can have rights, or what rights there *can* be which are not rights of persons? The truth is, that a distinction suggested by himself nearly tallies with the one which he rejects with disdain; or would tally with the latter, if the Roman lawyers had pursued the principle of the distinction consistently.—*Author's Note.*

For Mr. Bentham's Method, see Table IX. Vol. III. (*post*).

Heineccius, Recitationes, p. 52.
Mühlenbruch, D. P. vol. ii. p. 11.
Thibaut, System, vol. i. pp. 160, 164.
Mackeldey, Lehrbruch des heut. röm. Rechts, p. 150 et seq.
Hugo, Geschichte, pp. 105, 109, 116.

LECTURE XLIII.

[The following is obviously little more than the sketch of a Lecture, which must have been filled up *vivâ voce*.

The Notes at the end, entitled "Methods," etc., and frequently referred to in this and the succeeding Lectures, were found among papers some of which contain matter apparently destined to be employed in the completion of the Tables.*

For a full exposition of the subjects imperfectly treated in this and several subsequent Lectures, the reader is referred to these Tables (Vol. III., *post*), which, though lamentably incomplete, are finished as far as they go with the utmost care and accuracy.

The subject of *Status* is expounded in the Notes to Table II. —*S. A.*]

Law of Things and Law of Persons.

QUESTION. Whether *jus personarum* contains the law of *status?*: *i. e.* descriptions of the rights or duties, capacities or incapacities, which constitute *status*, or only of the events by which persons are invested with and divested of the *status*.

In this respect, all authors are inconsistent.† By scattering through the Law of Things many constituent elements of conditions, they partially defeat the purpose of the division.

The Roman Law and Blackstone *blend* the two methods; and, by consequence, lose the advantage of the first; keep the disadvantage of the second; and add a difficulty of their own: *i. e.* that of obliging the seeker to look for the

* For a description of the Tables, see Preface to Vol. I. p. xxxv.

† Authors of the Institutes, Blackstone, French Code, etc.

peculiarities of *status*, not only under the descriptions of the several rights and titles, but also under the (as by them treated) purposeless department of *jura personarum*.*

Injuries, civil and criminal, with the rights and duties they engender, and also civil and criminal procedure, should not be co-ordinated with *jus personarum et rerum*, but should be distributed under both.† *Jus actionum*, co-ordinated by the authors of the Institutes with *jus personarum et rerum*, should be spread under both. The division should be twofold only.

"Law of Things and Law of Persons," include Delicts, Rights, etc., *ex delicto* and Procedure.

Under "Law of Things," I include, not only such *jura in re* and *jura ad rem, ex contractu* and *quasi ex contractu*, as are independent of *status*, but also all such civil injuries, rights, etc., *ex delicto*, procedure, and parts of civil procedure; and also crimes, and such obligations *ex delictô publico*, and parts of criminal procedure as are likewise independent of *status*. And so, under every department of the Law of Persons. This arises from the very nature of the distribution. The object, as we have seen, is to distinguish the Universal from the Particular:—and, surely violations and sanctions *ex statu*, and violations, etc., not *ex statu*, as much need to be distinguished, as primary rights and obligations *ex statu et non*.

One of the reasons, too, for putting the Law of Things first, viz. the limited application of universal law to the peculiarities of *status*, is a reason for detaching *all these*, whether they belong to primary rights or not, from the rest. Blackstone makes no distinction between violations and sanctions as modified by *status* and as unmodified.

This is the consequence of his main division, which is not into Law of Things and Law of Persons, or into Gene-

* Method of Roman Lawyers, (2) (4). Method of Blackstone, (2) (3). See end of Lecture.

† Thibaut, *Ueber Jus personarum et rerum*, 8, 9, 19.

ral and Particular, but into Rights and Wrongs. The consequence of which is, that rights arising from injuries are not divided by him into general and particular.

Distinction between public and private law.

Criminal law is a part of public law (*latius acceptum*); and therefore is excluded by Roman Jurists from Law of Persons and Law of Things. But it ought to be distributed under those two departments.

In the Institutes, the law of political conditions and criminal law are not treated. In Blackstone, they are. The division should be twofold only.

Order of Law of Things and Law of Persons.

Possible simplification. Implication of one *status* with every other, as well as of every *status* with *jus rerum* or the body of the system: *e.g.* a married infant, a husband-soldier, a married woman, a trader, etc. But unless the system be simplified, lawyers cannot understand all of it. And not understanding all, cannot have complete knowledge of any part. If it were accessible to all lawyers, expense and uncertainty would be mightily diminished.

[We have now no Lord Coke. His resemblance to Roman Lawyers.]

Queries as to the outline of the Method.

[Should the Law of Things be preceded by an enumeration of the several classes of persons? Or should this be prefixed to the Law of Persons, and only so much relative to *status* in general precede the former, as suffices to illustrate the distinction between these two grand divisions?]

Reasons for postponing the Law of Persons to the Law of Things, and for treating this last most in detail.

The resemblances between different systems are found,

for the most part, in the generic parts of them; or in those departments of them which relate to the Law of Things. Though the law of things cannot be explained (in its whole extent) without occasional anticipation of the matter of the law of persons, yet it contains more *præcognoscenda et prætermittenda* than the latter. A previous notion of the law of things is a better preparative for the acquisition of the law of persons, than is a notion of the law of persons for the acquisition of the law of things.* This follows from the very nature of the distinction: namely, that the latter consists of such portions as affect classes comparatively narrow; as generally are themselves modifications of *jus rerum;* and as can be detached from the bulk of the legal system without breaking its continuity.

The method pursued in the Law of Things should be pursued under each head of the Law of Persons. (See Outline.)

In treating of any *status* (whether generic or specific) the rights and obligations, etc., direct or correlated, which grow out of it [or make it up] must be considered in the order observed under the Law of Things: *i. e.* Primary rights, with their subdivisions of *jura in re, jura ad rem,* compounds of both, *jura in universitatibus,* etc.; and violations of these primary rights and obligations, with the secondary or instrumental rights and obligations by which such violations are remedied or prevented.

Principles on which Rights and Obligations are to be referred to this or that Status.

The rights and obligations, capacities and incapacities, susceptibilities and exemptions, which belong to a certain class as *such* (whether such rights, etc., are originally rights, etc., of that *status,* or restorations of *jura rerum* in dero-

* Blondeau, II. Falck, citing Saurez.

gation of the rights, etc., of another *status* with which it is combined), must be considered together.

E. g: All that relates to the *status* "Infancy," *abstracted* from any other *status*, must be considered together. All that relates to the *status* "Trader" must also be considered together; including thereunder such *generic* rights and obligations as infants *when traders* enjoy or are subjected to, contrary to the general rules touching infancy.

In order to determine the status to which any given right with its correlating obligation shall belong, inquire (1°) whether the obligation exist for the sake of the right, or the right for the sake of the obligation: (2°) whether the right or the obligation (as the case may be) grow out of, or exist by reason of, any, and what, *status*. Having found that it exists as a consequence of the existence of such or such a class, treat the right with its correlating obligations, or the obligation with its correlating rights, as forming part of (or falling under) the *status* of that class.

Under any department of the Law of Persons are to be considered not only the rights and obligations peculiar to the *status*, but also rights and obligations (generic or not) *not belonging to the status as modified by it*.

A Right or Obligation, how it arises out of this or that Status.

If a right, it has a correlated obligation imposed upon others. But inasmuch as this obligation exists for the sake of the right, and *that*, as we have shown, exists by reason of the *status*, it follows, that the obligation is also a consequence of the *status*, exists for the sake of it, and ought to be treated with it. The same reasoning is applicable to obligations, wherever they induce the consideration of their correlated rights though existing in others: also to exemptions and incapacities.

The principles which lead to the distribution of the whole matter of law into "Law of Persons and Law of Things," must also determine the departments and subdepartments

into which the law of persons should be divided, with the order of those departments and of their several subdepartments.

1st principle; Separation of that which is peculiar to certain classes.

Status divisible into (1°) those which (though they *may* attach upon *any*, or upon almost any) are *limited to a few;* and (2°) those which attach upon *every* one (at some time or other of his life), or which, if not universal, are very *widely spread.* Instances of the first genus; trades, professions, government offices, etc.: of the second genus; the various domestic conditions: of the first species of this second genus, infancy, and the filial condition: of the second species of the same, marriage, and paternity.

The second genus, as being *of more general application,* should precede the first.

2nd principle; From the less to the more composite: From those which (to be complete) suppose not the explication of other or many *status*, to those which suppose such explication. But quære, if there be any such principle, *except in combination with the first.* For the modifications of the more general, by the more special *status*, it is natural to look, not into the first but into the last: *e. g.* for "Infant trader," not under "Infant," but under "Trader." Insomuch that "trader" supposes an explication of infant.*

Wherein Status consists.

Wherein *Status* consists.

The peculiarities of *status* seem to consist: (1°) In rights, obligations, and capacities peculiar to the class; whether such rights, etc., be *sui generis* or only modifications of others. (2°) In peculiar incapacities. (3°) In peculiar conditions to be fulfilled or observed before incidents can have their usual effect: But these seem to come under the head of peculiar rights, obliga-

* Blackstone, Vol. II. p. 476.

tions, etc., or incapacities; *i. e. conditional* rights, etc., or incapacities.

So that wherever a set of persons have rights, obligations, etc., peculiar to themselves; or are incapable of such as are common to many others, there is a *status:* or, in other words, the persons are determined to, or constitute a class.

Rights, obligations, (and capacities) which are not confined to one class, do not originate in *status.**

What it is that determines a person to this or that class, or what it is that makes the class.

1°. The being clothed with actual rights and subject to actual obligations, peculiar to persons of the class; the being capable of investment with such peculiar rights, and of subjection to such peculiar obligations; or the being incapable of certain rights and obligations of which persons of other classes generally are capable.†

2°. Rights and duties *ex speciali titulo,* and rights and duties *immediatè ex statu,* or arising from the mere fact that the party is living under the jurisdiction of the Government.‡

Generally speaking, a right or duty forming a constituent element of a condition has been preceded by two events: 1. The event investing the *status.* 2. A title specially investing the right or duty: *e. g.* the peculiar right of a married woman to land or goods.

This, however, is not true universally. There are rights or duties *ex statu immediatè,* or arising from the event investing the *status,* without the intervention of a special *titulus.* Such is the right *in rem* to the *status* itself. Such too is the right of the father to exact obedience from the

* Mühlenbruch, Vol. II. p. 12. Heineccius. Mackeldey. Corp, J. C., 164. Vom Beruf, p. 99. Blackstone, Vol. I. pp. 371, 423; Vol. III. p. 165.

† Gaius, pp. 4, 6, 59, 75. Institutes, 15, 5.

‡ See Lecture, *ante.* See Table II. note 5. Note in Outline about Public Law, Vol. I. p. cvi.

child, and to punish in case of disobedience. Such too is the corresponding duty of the child to render obedience; The right of the child to support: Certain rights and duties of husband and wife, guardian and ward, master and slave.

There are rights and duties in or upon all, *sine speciali titulo*, arising from the mere fact of their being within the jurisdiction of the given sovereign government (unless special incapacity intervened). [*E. g.* Right to personal security, etc.]* Such rights are called "natural or inborn," because, arising *sine speciali titulo*, there is no obvious investitive fact. But in truth, there is scarcely a right or duty *immediatè ex lege*. (Why called so, see Thibaut, *Jus in rem et in personam*.)

This applies to duties as well as to rights. There are many that might be deemed inborn rights besides those usually called such: *e. g.* capacity of an heir apparent or presumptive, or before *aditio* (in Roman law). Here there is no special *titulus*, but merely a general capacity to take a number of rights, (merely on the happening of certain incidents.)

A right, duty, capacity, or incapacity, which originates in *status*, (or forms a constituent element of a *status*,) is peculiar to persons of the given class; although it may happen to be denoted by a generic expression which comprises a right or duty in or on persons of other classes. *E. g.* An infant may be bound by a *contract*—but subject to conditions and modifications peculiar to contracts made by infants.

An incapacity (as, to contract, take by purchase, etc.) may be common to many classes, as to aliens, persons convicted and attainted, infants or married women (in certain cases): but in each case, the incapacity has something peculiar, in extent, ground, etc.

* See Blackstone, Vol. I. p. 121. Natural rights, inborn rights, absolute rights. Blackstone's confusion of meanings of "natural."

The Terms, "Law of Things" and "Law of Persons" (with their established equivalents) are insignificant:

i. e. They give no notion of the purpose of the distinction which they are intended to mark. Law is concerned with rights and obligations (or capacity or incapacity for them): every right resides in a person, and most rights concern *things* (in the Roman sense); every obligation is also imposed upon a person, and generally concerns a thing: therefore *all law is of or concerning persons, and most law, of or concerning things.**

"*General and Particular*"† would suffice; but the same terms are also used in other senses: viz., to denote law which obtains through the whole of any State, as opposed to that which is peculiar to districts or places.

"Law of Things" and "Law of Persons" is further objectionable for my purpose, because these two departments include Delicts, public and private, and Procedure, as modified by *status:* an extension, which (though absurdly) has not been given to them by others.‡ It may also be doubted whether Law of Things was intended to include *Jura ad Rem*.

General or generic Law and Law of status.

Law of the summum genus "Persons" (or Law directly interesting, or regarding, all persons): and, *Law directly regarding the several genera and species* into which Persons are divisible.

* See 'Method of Blackstone.'

† Traités, etc., Vol. I. pp. 150, 294.

‡ See 'Method of the Roman Lawyers and Blackstone.'

Notes.

(1.)

Method observed by Sir William Blackstone (vol. i. p. 122).

1. Law of Persons and Law of Things, *so far* as regards *primary* rights and obligations.

2. (*a*) Law of Civil Injuries—(*b*) of the rights and obligations which thence arise—(*c*) and of civil procedure:—abandoning, here, the former division into "Law of Persons and Law of Things;" and mingling civil injuries, etc., as *unmodified* by *status* (or as they concern all classes,) with the same, as *modified* by *status*.

3. (*a*) Law of Crimes, etc.:—abandoning again, etc.

Method as to *Sources*—Equity and many other branches only slightly touched upon (vol. iii. p. 23).

But Crimes, Special Law, and Public Law are not omitted. (See "Public and Special Law.")

Great superiority of Blackstone's Method to that of the Roman Institutional Writers, the French Code, etc.:—

1°. In treating civil injuries—rights, etc., *ex delicto privato*, and civil procedure, each apart from the other, instead of treating any one or two of them implicitly with another (vol. iii. pp. 115, 118).

2°. In treating crimes—rights, etc., *ex delicto publico*—and criminal procedure, in the same manner. "See Delicts."

(2.)

Remarks upon the Method observed by Sir William Blackstone.

Like Gaius and the compilers of the Institutes, he has no definite purpose in detaching the Law of Persons from that of Things. Throughout the law of things, much that arises out *status* is considered. *Therefore*, if he intended to make law of persons relate to rights, etc., *ex statu*, he has not adhered to that intention. On the contrary, much that relates to *status is* considered under the law of persons; so that if he intended law of persons to contain a mere enumeration of *status*, with the modes in which they begin and end, he has equally deviated from that.

[For a fuller account of the Method observed by Sir Wm. Blackstone, see Table VIII. (post) Vol. III.]

(3.)

Rights of Persons as defined by Blackstone (vol. i. p. 122).
Rights of Things; ibid.

The distinction supposes that *Things can have rights.*

This is founded upon a misapprehension of the terms of the Roman Law. By *jura personarum* and *jura rerum* the Roman lawyers intended, not the *rights* of Persons and Things, but the law of or relating to persons, and the law of or relating to things. This is manifest from Gaius, the Institutes, etc. The former having divided *Jus* or Law into *jus gentium* and *jus civile;* and having shown the various sources of the Roman Law or *Jus;* proceeds to divide that same subject according to the objects or subjects with which it is conversant: "Omne jus quo utimur vel ad personas pertinet, vel ad res, vel ad actiones. Sed prius videamus de personis." (Gaius, lib. i. § 8.) And having finished the *jus personarum,* proceeds to treat, not of the rights or even of the "law" of things, but of their Division and Acquisition.

The misapprehension is founded upon that ambiguity (the application of the same term to law and to one of the consequences or creatures of law) from which, as we have already observed, our own law language is almost alone exempt. (Jus; Dritto; Droit; Derecho; Recht.)

But the distinction as explained in the cited places, is not only founded upon a misapplication of language, and thereby involves the subject in obscurity:—it is also inconsistent with the subsequent exposition which Sir William Blackstone gives of these same rights. According to the terms of the distinction, the Rights of Persons are such rights as men have to their own persons or bodies: *i.e.* The right of moving without obstruction by others from place to place, subject to limitations imposed by law: and the right of freedom from bodily harm, subject to the same restriction. So that all such rights as a man may have in, over, or to external objects (whether other persons or things,) ought, in pursuance of the same distinction, to have been excluded from the rights of persons, and treated of nowhere but under the rights of things.

[Instances from the Commentaries in which Sir William Blackstone has treated rights to things under "Rights of persons," (in his sense) and conversely. Husband and Wife, Father and Child, etc., vol. i. p. 128. Property, p. 138.]

In consequence of his misapprehension of the term "Rights of persons," he has treated (Book I. c. 1) rights to life, reputation, etc., with the obligations to respect them, under the rights of persons; although as being common to every *status*, it is manifest that they belong to the rights of things. They are in truth universal *jura in re sine titulo*.

The Roman Law is free from this error; its error consisting in *partially* expounding the peculiarities of certain *status* under the "*Jus personarum*," instead of either giving thereunder a complete exposition of rights *ex statu* (on the one hand,) or of limiting that department (on the other) to a mere enumeration of *status* themselves, and of the modes of their investment and divestment. There is, however, no mingling of universal and particular rights, etc., under that department.

(1.)*

Methods of the Roman writers.
Methods observed in their detailed works.
General account of these works.

Methods observed in their institutional writings.
General account of these works.
Identity of this method with that observed in modern codes, and the most systematic expositions of a corpus juris by private hands.
Utility of a knowledge of the Roman law.
Comparative jurisprudence.†

(2.)

The distinction between the Jura Personarum and Jura Rerum, as stated by the Roman Lawyers;

Is not, like that of Blackstone, liable to the objection that things are supposed capable of rights.

* The List of subjects to be treated is numbered as above in the MS.

† Hugo E. pp. 128, 224, etc. Gaius, pp. 39, 41, 47, 48, 53.

It is however liable to the second objection which we have presumed to advance against the method of the learned Commentator.

Law, as it relates to Persons, ought to have been the only subject of the first grand division. Instead of this, innumerable instances may be cited in which the law as it relates to Things is therein treated of. The Law of Persons is not confined to a mere enumeration of *status*, and a description of the modes in which they begin and end. Instances of rights, obligations, etc., *ex statu*, are scattered up and down in the other departments.

" (3.)

Methods of the Roman writers.

Whether, according to the Institutional method of the Roman lawyers, *jura ad rem*, or obligations *stricto sensu*, belong to the Law of Things?

The dispute seems to have arisen from confounding *jura in re* with the *jus quod ad res pertinet*.

The first belong partly to the Law of Things and partly to that of Persons; not being (generically considered) either dependent upon or independent of *status*, but being distinguished by this: that they avail against mankind generally.

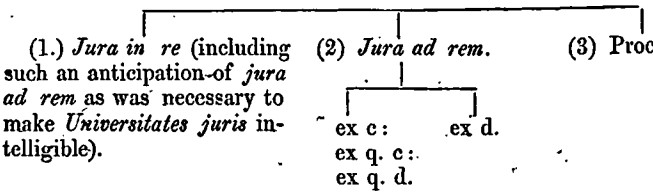
The latter was intended to include, not only all such *jura in re* as are independent of *status*, but also all such *jura ad rem* are also independent of *status*. Actions being intended to comprise Procedure only.

Proofs:—The announcement of the tripartite division with the corresponding method of treatment: The place occupied by succession *per universitatem* (sed quære). Sir William Blackstone's view of the subject; who places Property, etc., and Contract, etc., under a common department: viz. "Rights (or, as it ought to be, Law) of Things."—This also accords with the opinion of Suarez, who divides Law (*i. e.* primary rights and obligations), in the same manner into two departments, "Law of Things and Persons."

The scheme may have been the following:—

1st. Rights, etc., *ex statu* (or perhaps a mere enumeration of *status*).

2nd. Rights, etc., not *ex statu.*


(1.) *Jura in re* (including such an anticipation-of *jura ad rem* as was necessary to make *Universitates juris* intelligible).
(2) *Jura ad rem.*
ex c:
ex d.
ex q. c:
ex q. d.
(3) Procedure.

But, according to the announcement, Procedure and *jus in re* (in one of which *jura ad rem* must be comprised) co-ordinate with *jus personarum.*

Want of a generic expression may have led to all the confusion. Wanting a generic expression to denote the half which it was intended to oppose to *jus personarum,* they have co-ordinated its parts with *jus personarum,* forgetting one of them.

The effect of the whole is this: They intended (though the intention was obscure) to divide the whole of Private Law (excluding therefrom, not only political *status,* but also professional *status* and the whole of criminal law) into two principal departments; one of which they further meant to divide into three divisions. But for want of a generic name wherewith to designate this department, they have treated its divisions as if they were of the same rank as the other department. And further, through forgetfulness (or for some unaccountable reason) they have degraded one of these three divisions to the rank of a subdivision of one of the others, leaving it uncertain to which they intended to refer it.

If this were the scheme, "Obligations" belongs, neither to "*Jura Rerum*" nor to "*Actiones,*" but is a division (*on the same line with these*) either (1°) of the great department, "Law of Rights, etc., *non ex statu;*" or (2°) of the whole of private law (assuming that the proper subject of Law of Persons is a mere enumeration of *status,* etc.).

(4.)

Remarks upon the method observed by Gaius.

In pursuance of that well-founded distinction between Law of Persons and Law of Things which Gaius, in common with other institutional writers, has adopted, the main division (according to Ends and Subjects) *should not have been threefold (still less fourfold), but twofold;* the matter of the Law of Actions

(*i. e.* civil procedure), as unmodified by *status* (or in other words the *generalia* of the law of actions), being included under the Law of Things, and the several modifications, under the several *status* out of which they arise.

The treatise is confined to Private Law: *i. e.* all that relates to political *status*—to the Sovereign and to the administration of the sovereign power—is excluded. No regular account even is given of the constitution of Courts of Justice, without which the law of actions is not intelligible.

Criminal Law, or *publica judicia* (briefly mentioned in the Institutes): *i. e.* crimes, punishments, and criminal procedure, are altogether omitted; though the greater part of crimes are as much violations of private primary rights as the private delicts of which he treats. (So also Blondeau, X.)

The purpose of the distinction between Law of Persons and Law of Things, is not only forgotten with reference to civil procedure; but rights and obligations of all other sorts, without distinction to their universality or particularity, are scattered up and down through the two (or three) first divisions. If the purpose was to sever Law of Persons from Law of Things in the manner supposed, all the rights, etc., *ex statu* should have been put into the former, and it should have been placed last.

If the purpose merely was to enumerate the several *status* and to explain the respective modes in which they begin and end, and then to deal with rights and their respective modifications *ex statu* in succession (as explained above), the matter of the treatise should have been divided in a totally different manner; and none of the Rights, etc. which originate in the several *status* should have been thrust into the preliminary enumeration of them.

On that supposition, there would have been no such division as that into Law of Persons and Law of Things. But the space now occupied by what is called the law of persons, would have been merely an introductory disquisition on the several *status*; —the body of the work comprising all rights and obligations; those which originate in *status*, as well as those which do not.

Another great defect is, *the desultory and defective manner of dealing with delicts*. For, first, he confines the term to violations of *jura in re*; only treating *ex professo* of these: as if violations of rights *ex contractu* and of other *jura ad rem* were not just as essential to a complete view of the subject. Secondly, he scatters them through that part of the Law of Things which

relates to Obligations, *stricto sensu*, or to *jura ad rem*, and also through the book which is professedly devoted to Procedure;—thus confounding the matter of Actions and Exceptions, etc. with the mode in which these several rights are enforced. Violations of *jura ad rem* are in the same case; and, as is said above, are nowhere expounded explicitly and professedly: being either considered implicitly (under the head "*De Obligationibus*") on occasion of the obligations of which they are violations; or explicitly under "*actions*."*

Another defect common to Gaius and the Institutes, is the confounding combinations of Alienation and Contract with Contract; and the placing *universitates juris* before *jura ad rem*. See "Combinations of *jus in re and jus ad rem*."

(5.)

Remarks upon the Method observed in the Institutes.

Having announced a threefold division, (and the same objection applies to Gaius)—Persons, Things, and Actions, the compiler makes a fourfold one; treating under "Things," of *jura in re*, and under "Obligations," of *jura ad rem*: thus opposing one *species* of rights and obligations to another (not by names, one of which denotes one *species* of rights, etc.; and another, another; but) by names the last of which, indeed, has reference to a *species* of rights, but the first of which denotes the subjects of rights. The result of this division is, that instead of treating of "Things" apart, and then opposing one species of rights over things (and other subjects) to another;—he indicates things and a species of rights by a name which seems to oppose things to rights; and, what is worse, to oppose them to *a sort* of rights. A consequence of which is, that *jura in re* seem to be suppressed.

Another objection is, that as the obligations which correspond to *jura in re* are not treated of explicitly (but left to be collected from "delicts"), and, on the other hand, the term "obligation" is used to denote *jura ad rem, as well as* their corresponding obligations, the first seem to be rights without obligations, and the second, obligations without rights. But this arises from that remarkable defect in the Roman law language which I have observed upon above.

The modes in which *jura in re end*, are not described.

* Hugo, E. p. 284; Gaius, pp. 241, 558.

LECTURE XLIV.

Jus pub. et Jus priv.—various meanings of "*public* law," special law, or law of professional conditions.—

HAVING discussed the distinction between Law of Things and Law of Persons, I proceed to the connected distinction between Public Law and Private Law.

The term "*public law*" has two principal significations: one of which significations is large and vague; the other, strict and definite.

Taken with its strict and definite signification, (to which I will advert in the first instance,) the term public law is confined to that portion of law which is concerned with political *conditions:* that is to say, with the powers, rights, duties, capacities and incapacities, which are peculiar to political superiors, supreme and subordinate.

Taken with its strict and definite meaning, public law ought not (I think) to be *opposed* to all the rest of the law, but ought to be inserted in the Law of Persons, as one of the limbs or members of that supplemental department.

But before I proceed to the *place* which public law (as thus understood) ought to occupy in an arrangement of a *corpus juris,* I will touch briefly on two difficulties, which, it appears to me, are the only difficulties that the subject really presents.

I have said that public law (in its strict and definite signification) is confined to that portion of law which is concerned with political conditions: that is to say, with the powers, rights, duties, capacities and incapacities, which

are peculiar to political superiors, supreme and subordinate.

Now so far as public law relates to the Sovereign, it is clear that much of it is not law, but is merely positive morality, or ethical maxims. As against the monarch properly so called, or as against the sovereign body in its collective and sovereign capacity, the so-called laws which determine the constitution of the State, or which determine the ends or modes to and in which the sovereign powers shall be exercised, are not properly positive laws, but are laws set by general opinion, or merely ethical maxims which the Sovereign spontaneously observes.

In strictness, therefore, much of the public law which relates to the sovereign or state, is not matter for any portion of the *corpus juris*: understanding by the *corpus juris*, the system or collective whole of the positive laws which obtain in any society political and independent.

And, for the same reason, it particularly is not matter for the Law of Persons or *Status*. For a *status* or condition, properly so called, consists of *legal* rights and duties, and of capacities and incapacities to take and incur them. And, consequently, a sovereign government of one, or a sovereign government of a number in its collective and sovereign capacity, is not invested with a *status* (in the proper acceptation of the term): or it is not invested with a *status* (in the proper acceptation of the term) derived from the positive law of its own political community.

But though, in logical rigour, much of the so-called law which relates to the sovereign, ought to be banished from the *corpus juris*, it ought to be inserted in the *corpus juris* for reasons of convenience which are paramount to logical symmetry. For, though, in strictness, it belongs to positive morality or to ethics, a knowledge of it is absolutely necessary in order to a knowledge of the positive law with which the *corpus juris* is properly concerned.

The case which I am now considering is one of the nu-

merous cases wherein law and morality are so intimately and indissolubly allied, that, though they are of distinct natures and ought to be carefully distinguished, it is necessary nevertheless to consider them in conjunction. A description, therefore, of the law which regards the constitution of the State, and which determines the ends or modes to and in which the Sovereign exercises the sovereign powers, is an essential part of a complete *corpus juris*, although, properly speaking, that so-called law is not positive law.

The law of England, for example, cannot be understood, without a knowledge of the constitution of Parliament, and of the various rules by which that sovereign body conducts the business of legislation: although it is manifest that much of the law which determines the constitution of the Parliament, and many of the rules which Parliament follows in legislating, are either mere law imposed by the opinion of the community, or merely ethical maxims which the body spontaneously observes.

So much, therefore, of the law, regarding the sovereign, as is necessary to a due understanding of the *corpus juris*, ought to be inserted in the *corpus juris*, although it comes not within the predicament of *positive law*. And, since the law regarding the sovereign ought to be inserted in the Law of Persons, we may say, by way of analogy, that the sovereign has a *status* or condition; although a *status*, properly so called, is composed of *legal* rights and *legal* duties.

And here I will remark, that public law (in its strict and definite meaning) is not unfrequently divided into two portions: *constitutional* law, and *administrative* law: (*Staats-recht* or *Constitutions-recht*, and *Regierungs-recht*.) The first comprises the law which determines the *constitution* of the sovereign government: The second comprises the law which relates to the *exercise* of the sovereign powers, either by the sovereign or by political subordinates.

[*v.v.* This does not tally exactly with the division of law into law regarding the *status* of the Sovereign, and law regarding the

status of political subordinates. Example: Law regarding the constitution of Parliament: Law observed by the Parliament in the conduct of public business.]

The second of the two difficulties to which I have adverted, is the difficulty of drawing the line of demarcation by which the conditions of private persons are severed from the conditions of political subordinates. The powers of master, father or guardian, subserve, in many respects, the very purposes for which powers are conferred on judges.

This difficulty I have stated in my Outline (p. cxi.) in the following words.

"It is somewhat difficult to describe the boundary by which the conditions of political subordinates are severed from the conditions of private persons. The rights and duties of political subordinates, and the rights and duties of private persons, are creatures of a common author: namely, the sovereign or state. And if we examine the purposes to which their rights and duties are conferred and imposed by the sovereign; we shall find that the purposes of the rights and duties which the sovereign confers and imposes on private persons, often coincide with the purposes of those which the sovereign confers and imposes on subordinate political superiors. Accordingly, the conditions of parent and guardian (with the answering conditions of child and ward) are not unfrequently treated by writers on jurisprudence, as portions of *public* law. For example: The *patria potestas* and the *tutela* of the Roman Law, are treated thus, in his masterly *System des Pandekten-Rechts*, by Thibaut of Heidelberg: who for penetrating acuteness, rectitude of judgment, depth of learning, and vigour and elegance of exposition, may be placed, by the side of Von Savigny, at the head of all living Civilians."

The terms "public law" and "private law" tend to generate misconceptions. The only solution of the difficulty seems to be, that both are public, and both private: though the one regards more especially the public at large; the other, more especially determinate persons. Perhaps it is impossible to draw the line with perfect distinctness:

insomuch that some will consider a given condition, public; others, private.

Of the numerous reasons for inserting public law in the Law of Persons, which I have marked down, the following, I think, will amply suffice:

1. In explaining the nature of the distinction between Law of Things and Law of Persons, I said that there are two reasons for detaching the rights and duties of certain classes from the body of the legal system: 1st. That it is convenient to place them together under separate heads, instead of leaving them dispersed throughout the whole extent of the *corpus juris*:

2dly, That they may be detached from the body of the legal system without breaking the coherence of the latter: nay, that the exposition of the latter is more compact and clear, in consequence of those rights and duties being detached from it, and remitted to the supplement or appendix styled the Law of Persons.

Now both these reasons apply in an eminent degree to the powers, rights and duties of political superiors. With the exception of the powers and duties of judges and other ministers of justice, (which perhaps it is expedient to prefix to the general law of procedure,) there are no classes of persons whose peculiar rights and duties may be detached more commodiously from the bulk of the legal system, than those of public or political persons.

And, secondly, If the powers, rights and duties of political persons ought to be detached from the bulk of the legal system, it is clear that they ought not to be opposed to all the rest of the system: but ought to form a limb of the miscellaneous and supplemental department which is marked with the common name of the Law of Persons. For the law which regards specially the powers and duties of political persons, is not of itself a complete whole, but is indissolubly connected, like the law of any other

status, with that more general matter which is contained in the Law of Things, and also with the law regarding other conditions.

Take, for example, the case of our own King. It is clear that a knowledge of his peculiar powers, rights and exemptions presupposes a knowledge of the Law of Things, and also of many of the *status* which are styled private. Without a knowledge of the general rules of property, his peculiar proprietary rights, as king, are not intelligible. Without a knowledge of the law of descents, the peculiarities of his title to the crown, are not to be understood. Without a knowledge of the law of marriage, his peculiar relations to his royal consort are not explicable.

And the same may be said of the powers and duties of any political person whatever. Considered by themselves, they are merely a fragment. Before they can be fully understood, they must be taken with their various relations to the rest of the legal system.

If, then, the law of political persons be opposed by the name of *public law* to the rest of the legal system, one of these absurdities inevitably ensues. Either a bit of the *corpus juris* is opposed to the bulk or mass: Or (to avoid that absurdity) the rest of the legal system must be appended to public law; and public law, *plus* the rest of the legal system, must be opposed to that rest of the legal system from which public law is severed.

There can be no more reason for opposing public law to the rest of the legal system, than for opposing any department of the law of persons to the bulk of the *corpus juris*. What should we say to a division of law which opposed the law of bankruptcy, or the law of marriage, to *the* Law? And yet the division of law into *jus publicum* and *jus privatum* involves the same absurdity. For *jus publicum* is the law of political conditions, and *jus privatum* is all the law, *minus* the law of political conditions.

Agreeably to the view which I now have taken of the

subject, Sir M. Hale in his Analysis of the Law, and Sir William Blackstone, following Sir Matthew Hale,* have placed the law of political persons (sovereign or subordinate) in the Law of Persons: instead of opposing it, as one great half of the law, to the rest of the legal system. †

From public law with its strict and definite meaning, I pass to public law with its large and vague signification.

Endeavouring to explain its import, as taken with its large and vague signification, I will advert to the distinction between *jus publicum et privatum* as drawn by the Roman lawyers: that being the model or pattern upon which the modern distinctions into public and private law have all of them been formed.

The Roman lawyers divide the *corpus juris* into two opposed departments:—the one including the law of political conditions, and the law relating to crimes and criminal procedure: the other including the rest of the law. The first they style *jus publicum*, the second they style *jus privatum*.

In a former Lecture ‡ I explained the origin of the term "public wrongs." As I also there stated, the original reason for the name ceased. And, they were afterwards called *public*, because they were supposed to affect immediately the interests of the whole community.

Inasmuch as criminal law was, therefore, supposed to affect more directly the interests of the whole community,

* Remark on Hale's "Disposition of corporations." This arrangement of the Law of political persons, seems to be peculiar to Hale and Blackstone. It is considered by Falck a "*Verwirrung*," etc.

"In den Rechtssystemen ausländischer Gelehrten, z. B. der Dänen und Engländer, wird bisweilen die Abhandlung der staatsrechtlichen Verschiedenheit unter den Menschen auch in der Personenrecht gezogen. Diese Verwirrung der Begriffe kommt bei uns gar nicht vor."—*Falck*, p. 18.

† See Table VIII. Vol. III. (*post.*)

‡ See *ante*, p. 192.

and inasmuch as the law of political *status* does really regard it in a more direct manner than any other portion, criminal law and the law of political conditions were placed by the classical jurists together, and were opposed to all the rest of the *corpus juris.**

They style criminal law and the law of political conditions *jus publicum:* for, say they, "ad statum rei Romanæ, ad *publice* utilia spectat."

They style the opposed department of the *corpus juris jus privatum:* for say they, "ad *singulorum* utilitatem, ad *privatim* utilia spectat."

This explains the order of Justinian's Institutes. It is merely a treatise upon private law. By consequence, criminal law, with the law of political *status*, is not comprised by it: The classical jurists, from whose elementary works the Institutes were copied, having thought that public law was not a fit subject for an institutional or elementary treatise.

[Absurdity of this notion, on account of the inevitable implication of the parts.]

Blackstone's Commentaries are not confined to private law, but are intended to serve as an institutional treatise on the whole Law of England: though he touches upon certain parts, (as upon equity and ecclesiastical law,) in a comparatively brief and superficial manner.† And not only do his Commentaries embrace criminal law and the law of political *status*, but the distinction between public and private law is rejected or suppressed by the writer. He does not style the law regarding political conditions a branch of public law. But, this notwithstanding, there is still a trace of the distinction in Blackstone's Commentaries. He styles the department which relates to crimes, and to punishments and criminal procedure, "Public Wrongs."

* See Method of Roman Lawyers (4); Mr. Bentham's Method. See Table IX. Vol. III. (*post.*)

† Method of Blackstone (1). See Table VIII.

[For an examination of the distinction into public and private law, as drawn by the classical jurists, see Table I., Notes 2 and 8 (*post*), Vol. III.]

With reference to its ultimate purpose, the law of political *status*, and criminal law, is not to be distinguished from the so-called *private law*. Each tends to the security of the *public*: meaning by the *public*, the several individuals who compose the society, as considered collectively or without discrimination. Each tends to the good of those same individuals considered singly or severally. The only difference is, that in the one case the good of the whole is considered more directly: whilst, in the other, the more immediate object is the good of determinate individuals.

Another reason against the distinction is this. That the matter of the Law of Things is just as much implicated with public law as with the law of private conditions.

[I have already remarked that the relation borne by the Law of Things to the Law of Persons, is like the relation borne by the genus to the species. To oppose public law to the rest of the law, is to oppose one of the species to all the rest: and there is the same absurdity in the opposition of ecclesiastical to civil, military to civil, etc.

Some of the moderns include under public law, not only criminal law and law of political *status*, but civil procedure. Their reason for which is, the nature of the instrumentality; *i.e.* because the laws are enforced by public persons. This is just as rational. For it is impossible to rest the distinction upon any sound basis.

By many German writers, the law of nations is also included in public law: an arrangement suggested by the same false notion; that there are portions of law which exclusively regard the public.

It also involves the absurdity of confounding positive law and positive morality. So far as international law becomes by adoption positive law, it can scarcely belong to any particular department.

From the utter impossibility of finding a stable basis for the division, others exclude criminal law. They see that a multitude of crimes affect individuals as directly as the delicts which are styled civil.

Various senses of the term public law.

Prohibitions from public policy.

Definite and obligatory modes of performing certain transactions. Testamentifactio non privati sed publici juris est.

Pacta quæ ad jus, et quæ ad voluntatem spectant. Jus publicum privatorum pactis mutari non potest. An identical proposition. Or "Privata conventio juri publico nihil derogat."]

Public and special law, or law of political and professional *status*, are departments of the Law of Persons. Public Law, in this (or any other sense) is not distinguishable from any other portion of internal law by its final cause: viz. the good of the Public. Public Law in this sense, is adjective, instrumental or sanctioning: but so is the law of crimes and civil injuries, of rights *ex delicto*, and of procedure: nay, so are many portions of primary, or civil, rights, etc. If therefore, the distinction into private and public law, is to be observed, *these* must enter into public law.—If crimes and criminal procedure are to be included in public law by reason of their sanctioning character, so must civil injuries, etc. (See Notes, p. 428 et seq.)

Public Law and Private Law cannot (in these senses) be opposed to one another, or treated as co-ordinate departments of a common whole. The Law of Things (and even the law of descents and professional *status*) contain matter which political *status* suppose; and which are also supposed by public law in any other sense.* The term "public law" is mis-expressive; as denoting, not merely the law of political *status*, but either *all* law, or all law which regards violations and sanctioning rights, etc.

The distinction between private law and public law (considered as *co-ordinate* departments) rests upon no intelligible basis, and is inconvenient. If it be said that the end of public law is the protection and enforcement of primary

* Blackstone. Instances in Parliament, King, etc., Vol. I. p. 193.

† Hugo, E. pp. 16. 18. 85. 99. 283. 429.

rights and obligations in and on individuals, the answer is, that that is also the end or final cause of the law of civil injuries, etc., and of the law of crimes, etc. A property or quality which belongs to several objects, can be no ground for distinguishing some of them from the rest.

By "the Public" (where it means anything) we mean all the individuals who compose the community, governors as well as governed. In which sense of the word public, *all Law is public;* whether we look to the *persons* in whom rights and obligations reside; or whether we look to what is, or at least ought to be, the *end* of law:—that end being the good of all. If it be said, that by "the public" is meant the governors, and by private persons, the governed; by Public Law, the law which relates to the powers, rights, and obligations of the governors as such; and by Private Law, the rights, etc. of the governed as such; the answer is that the *terms* are equivocal: "public," denoting something besides "relating to governors."

Public Law is that portion of the law of any country which determines the powers, rights, and obligations of certain *status*: viz.: those of governors as such; and, by implication, those of the governed as such.

Private Law:—that which determines all the rights, etc. of all the other classes, exclusive of their rights, etc. against or towards the governors.

There is no reason for opposing the rights, etc. which grow out of *political status* to all others; more than for opposing the rights, etc. which grow out of *any* other *status* to the rest of the law.

If it be said that these rights, etc. *are purely instrumental;* the answer is, so is Criminal Law. And if it be said that *that* is also public, so is the law of civil injuries; nay, so are many of the primary rights which are confessedly private or civil; as *e. g.* those of trustees—those of parents, to a considerable extent.

It is not contended that they ought not to be *separated;*

but it is contended that they ought not to be *opposed* to all the rest.

All relations of subject to subject imply another relation to the Sovereign as wielding the sanction; And in this sense, absolute obligations are relative; *i. e.* relative to the power or right of punishing, in case of violation.

The great reason against the division is this:—That many or most of the generalia which are contained in the Law of Things are just as applicable to the *status* of governors as to any of those of the governed: *e. g.* the governor is proprietor; makes contracts, etc. These generalia, therefore, applying to all *status*, you cannot logically separate one of these *status* from the rest, and oppose it, not only to the rest, but also to that generical matter which is common to it with the rest. Suppose I opposed animals and horses to men, by reason of an imaginary superiority in men to other animals.

The judicial, military, and other political *status* stand in the same relation to primary rights, as sanctioning rights and obligations; *i. e.* they minister to the protection of those primary rights. This is a reason for rejecting the division into *jus privatum* et *jus publicum*. For either delicts, rights *ex delicto*, and procedure, must be arranged with *jus privatum*, contrary to the division; or the division must be preserved, and the connection between primary rights, etc. and sanctions, lost sight of, in consequence of the burying these last in the rights, etc. of governors. Again, the primary rights of governors stand, with the sanctioned rights of the governed, in a common relation to sanctioning rights and obligations. The Sovereign is not only the author of Law, but is also protected in his primary rights by the sanction which emanates from himself.*

Again, many of the definitions and explanations contained in *jus privatum* are equally applicable to *jus publicum*. Where then, with this division, are they to be placed? Are

* See "Outline," Vol. I., p. lxxv.

they to be placed under *jus publicum?* or repeated in both? or separated from both, and treated under a common head? [*E. g.* All those parts of procedure which are not specially applicable on behalf of, or against political persons, ought to be placed under *jus privatum* (Law of Things and Law of Persons) and yet that part of them which belongs to Law of Things, is as much a *præcognoscendum* to political as to private *status.*]

Jus publicum, so far as it has a meaning, denotes all those rights and obligations (including institutions) which minister to the protection of other rights. In this sense, the law of civil injuries, crimes, etc., is a part of *jus publicum*. To sever therefore *jus publicum* from *jus privatum* would lead to a most inconvenient arrangement; destructive of the division into Law of Things and Law of Persons.

The fundamental distinction of Law of Things and Law of Persons, is built upon the convenience of considering the genus apart from, and before, the several species contained under it. By consequence, *so much of jus publicum* (whether it consist of constitutional, judicial, or any other branch of administration) as is necessary to the apprehension of the genus "Law of Things," should be put into the Law of Things; the rest, dismissed to the Law of Persons. The objection urged by Falck to Blackstone in this respect appears to me to be unfounded.

International law, so far as adopted, etc., is, in a great measure, *private* law (*i. e.* it regards the relative rights and obligations of private persons, members of separate states); and belongs to Law of Persons: Aliens, seamen, etc.

If private law ought to be opposed to public, it ought to precede; since that part of it which is called the Law of Things contains numberless *præcognoscenda* and *prætermissenda* which are equally applicable under public law, and which, therefore, must otherwise be repeated.

To oppose public law to private, is to oppose the law which regards certain classes of persons to all the rest of

the law: *i. e.* not only to the law which regards the rights, etc. that are particular to all other classes, but to the rights, etc. which regard *all* (public persons included). Much of what must be looked at in considering public law, is, in every system, included under private law; so that here is a division, of which one of the members contains much that belongs to the other. Ecclesiastical and *Civil*, Military and *Civil*, etc. are in the same case.

Haubold, p. 4.
"Principles," etc., p. 332.
Falck, pp. 38. 45–8. 52. 65. 76.
Thibaut, Abhandlungen.
Vom Beruf, p. 62.
Blackstone, Vol. I. p. 141. Vol. II. p. 285. Vol. III. p. 215.
Institutes, p. 2.

NOTES.

The only wrongs which, with propriety, can be called "public" are violations of such rights (if any such there be) as are vested in the public (not in the government *for* the public): Meaning by the Public, in the first instance, a corporate or juridical person; and by the Public (in the second instance) that aggregate of individual and juridical persons who can only be considered as a whole, by reason of their living under the protection of the same government. In some of the United States, indictments, etc., are drawn in the name of the People, Commonwealth, etc.; but this is a mere flourish.

Any injury cognizable by the law of England will be found to be an injury to some person or body of persons. Public nuisances for instance; offences against *bonos mores*, etc., which seem to be violations of obligations to which there are no corresponding rights in any given person or persons; and which may be called public offences, by reason of the injury being entirely contingent, and being liable to fall upon *any* of the whole heterogeneous mass which is called the Public. In all other cases of intentional or negligent violation, there is this same contingent evil, but there is also a past injury done to some assignable individual, either in his own right or as trustee for others. —*Marginal Note in Blackstone*, vol. iii. chap. 13.

Jus publicum.

1°. Jus quod ad statum rei publicæ spectat.

2°. Jus legislatore [publice] constitutum [idque directe vel indirecte] } oppositum { Normis privatorum voluntate, legibus consentientibus, constitutis.

3°. Jus commune, oppositum singulari.

4°. Jus prohibitivum sive absolute obligans. } oppositum { dispositivo sive provisionali.

MS. *Table in margin of Mühlenbruch*, vol. i. p. 76.

LECTURE XLV.

Division of the Law of Things (or *the* Law minus the Law of Persons) into primary and sanctioning rights, etc.: Of primary rights, etc., into four heads. Place for *jus in personam* or obligations.

I HAVE endeavoured to suggest the purport and uses of the division into Law of Things and Law of Persons: into General Law and Special Law: into a General Code and Particular Codes: or into *the* Law considered generally, and those portions of the law which peculiarly regard peculiar classes of persons, and which it is commodious to detach from the bulk of the system, and to consider (in appropriate chapters) under a distinct department.

I have also endeavoured to explain the various meanings which are annexed to the expression *jus publicum*:—to explain the two disparate distinctions between *jus publicum* and *jus privatum*;—to shew that the distinctions are needless and perplexing;—and that public law, taken with a definite meaning (or as meaning the law of political conditions), ought not to be opposed to the rest of the law, but ought to be inserted in the Law of Persons, as one of its limbs or members.

I will now endeavour to explain the main division, which, in my opinion, should be given to the Law of Things.

The leading division which I would give to the Law of Things, I will first read from my Outline, and will then endeavour to illustrate by additional remarks.

1. There are facts or events from which rights and duties arise, which are legal causes or antecedents of rights and duties,

or of which rights and duties are legal effects or consequences. There are also facts or events which extinguish rights and duties, or in which rights and duties terminate or cease. The events which are causes of rights and duties may be divided in the following manner: namely, into acts, forbearances, and omissions, which are violations of rights or duties, and events which are not violations of rights or duties.

Acts, forbearances, and omissions, which are violations of rights or duties, are styled delicts, injuries or offences.

Rights and duties which are consequences of delicts, are sanctioning (or preventive) and remedial (or reparative). In other words the ends or purposes for which they are conferred and imposed, are two: first, to prevent violations of rights and duties which are not consequences of delicts: secondly, to cure the evils or repair the mischiefs which such violations engender.

Rights and duties not arising from delicts, may be distinguished from rights and duties which are consequences of delicts, by the name of "primary" (or principal). Rights and duties arising from delicts, may be distinguished from rights and duties which are not consequences of delicts by the name of "sanctioning" (or "secondary").

My main division of the matter of the Law of Things, rests upon the basis or principle at which I have now pointed: namely, the distinction of rights and of duties (relative and absolute) into primary and sanctioning. Accordingly, I distribute the matter of the Law of Things, under two capital departments—1. Primary rights, with *primary* relative duties. 2. Sanctioning rights with *sanctioning* duties (relative and absolute): Delicts or injuries (which are causes or antecedents of sanctioning rights and duties) included.*

If I adopted the language of Mr. Bentham, and of certain German writers, I should style the law of primary rights and duties, *substantive* law; and the law of sanctioning or secondary rights and duties, *adjective* or *instrumental* law. In other words, I should divide the Law of Things, or the bulk of the legal system, into law conversant about rights and duties which are *not* means or instruments for rendering others available; and law conversant about rights and

* Outline, p. LXXV.

duties which are merely means or instruments for rendering others available. Substantive law as thus understood is conversant about the rights and duties which I style primary: Adjective law, about the rights and duties which I style secondary.

But it will appear, on a moment's reflection, that the terms substantive and adjective law tend to suggest a complete misconception of the nature of the basis on which the division rests.

All the rights and duties which I style sanctioning or secondary, are undoubtedly means or instruments for making the primary available. They arise out of violations of primary rights, and are mainly intended to prevent such violations: though, in the case of the rights and duties which arise out of civil injuries, the secondary rights and duties also answer the subordinate purpose of giving redress to the injured parties.

But though secondary rights and duties are merely adjective or instrumental, many of the rights and duties which I style primary are also of the same character. *E. g.*: The rights and duties of Guardians are merely subservient to those of the ward: The guardian is clothed with rights and duties in order that the rights of the ward may be more effectually protected, and in order that the duties incumbent on the ward may be more effectually fulfilled.

The same may be said of many of the rights and duties of Parents: of most of the rights and duties of subordinate political superiors; and, generally, of all rights which are merely fiduciary, or are coupled with trusts. These rights and duties suppose the existence of others, for the protection and enforcement of which they are conferred by the State.

In short, rights and duties are of two classes:

1st. Those which exist *in* and *per se*: which are, as it were, the ends for which law exists: or which subserve immediately the ends or purposes of law. 2dly. Those which imply the existence of other rights and duties, and which

are merely conferred for the better protection and enforcement of those other rights and duties whose existence they so suppose.

Though secondary rights and duties (or rights and duties arising out of injuries) are of this instrumental character, many rights and duties which are primary or principal (or which do not arise out of injuries) are also of the same nature. The division therefore of Law into law regarding primary rights and duties, and law regarding secondary rights and duties, cannot be referred to a difference between the purposes for which those rights and duties are respectively given by the State. And I object to the names, "Substantive and Adjective Law" as tending to suggest that such is the basis of the division. It appears to me that the division rests exclusively upon a difference between the events from which the rights and duties respectively arise.

Those which I call primary do not arise from injuries, or from violations of other rights and duties. Those which I call secondary or sanctioning (styling them *sanctioning* in respect of their principal purpose) arise from violations of other rights and duties, or from injuries, delicts or offences.

The rights and duties which I style secondary, suppose that the obedience to the law is not perfect, and arise entirely from that imperfect obedience. If the obedience to the law were absolutely perfect, primary rights and duties are the only ones which would exist; or, at least, are the only ones which would ever be exercised, or which could ever assume a practical form. If the obedience to the law were absolutely perfect, it is manifest that sanctions would be dormant: and that none of the rights and duties which sanction others, or which are mainly intended to protect others from violation, could ever exist in fact or practice, although they would be ready to start into existence on the commission of injuries or wrongs. If the disposition to obey the law were perfect, and if the law were perfectly known by all, there would be no injuries or violations of

the law: and, by consequence, all the law relating to injuries, to the rights, duties, and other consequences flowing from injuries, and to procedure, would lie dormant.

[Courts of Justice (considered as such) are necessary for two purposes: 1st. To enforce the law where it has been violated: 2dly. To construe or interpret the law where uncertain.]

My main division of the Law of Things is therefore this: 1st. Law regarding rights and duties which do not arise from injuries or wrongs, or do not arise from injuries or wrongs directly or immediately.* 2dly. Law regarding rights and duties which arise directly and exclusively from injuries or wrongs. Or, law enforced directly by the Tribunals or Courts of Justice: and law which they only enforce indirectly or by consequence. For it is only by enforcing rights and duties which grow out of injuries, that they enforce those rights and duties which arise from events or titles of other and different natures.

Under the department of the law which relates to secondary rights and duties I include Procedure, civil and criminal. For it is manifest that much of procedure consists of rights and duties, and that all of it relates to the manner in which secondary rights and duties are exercised or enforced.

[Criticism on Mr. Bentham, and German writers, for detaching mere law of procedure from the rest of the body of the *Corpus Juris*. Double inconsistency, in *calling* it adjective or instrumental, and in *limiting* the epithet (admitting it to be applicable) to the law of procedure.]

* When I say that secondary rights arise from injuries or wrongs, I do not mean to deny that primary rights and duties may arise from injuries or wrongs in a remote or consequential manner. *E.g.*: Rights arising from a judgment. (See Outline, p. CIII.)

Distinction between an action considered as a right, and an action considered as an instrument by which the right of action is itself enforced.

It is frequently said of an action, considered in the former manner, that "actio non est *jus*, sed *medium* jus persequendi:"—that it is not the right of action itself, but the mean or instrument by which that right is enforced. But it is impossible to distinguish completely a *right of action* from the action or procedure which enforces it. For much of the right of action consists of rights to take those very steps by which the end of the action is accomplished. It is perfectly true, that the scope or purpose of the right of action is distinct from the procedure resorted to when the right is enforced. Much of the procedure consists of rights which avail against the ministers of police rather than against the defendant. And the parts of it which consist of rights against the defendant himself, are totally distinct from the end which it is the object of the process to accomplish.

But still it is impossible to extricate the right of action itself from those subsidiary rights by which it is enforced. And it is manifestly absurd to deny that the process involves *rights*, because the rights which it involves are instruments for the attainment of another right.

[Difficulty. Whether every right of action arise from an injury?

The only cases in which it *does not*, arise from that anomaly in the English Law which I endeavoured to explain in a preceding Lecture; *i.e.* cases in which a right of action is given, although there has been no wrong, on account of the want of wrongful consciousness on the part of the defendant.

Instance:—Possession *bonâ fide:* as in cases of money paid and received under a mistake: or of possession by purchase from a stranger who had no title: So long as the unconsciousness lasts, the possessor is not guilty of a wrong, but lies under a quasi-

contract to restore. So soon as consciousness arises, he is guilty of a wrong.

In the case of an amicable pursuit, it may appear that there is a right of action without a wrong. But, in these cases, the question always is, whether there be in truth a wrong or not? A question arising from the uncertainty of the law, or from some uncertainty as to the fact.

What I affirm is, that every right of action arises from a wrong. I do not affirm that an action may not be wrongfully brought, or may not be brought in a case where there has been no wrong. So long as law and fact shall continue uncertain, questions will frequently arise as to whether a wrong has been really committed or not. To determine this very question is manifestly the purpose of the process which is styled pleading: *i. e.* of every step in the process which succeeds the plaintiff's demand.

No Court of Justice (*acting as such*) would decide on a question of law or fact without a suggestion of a wrong, actual or impending.]

In most systems of law, a vast number of primary rights and duties are not separated from the secondary: That is to say; The primary right and duty is not described in a distinct and substantive manner; but it is created or imposed by a declaration on the part of the legislature, that such or such an act, or such and such a forbearance or omission, shall amount to an injury: And that the party sustaining the injury shall have such or such a remedy against the party injuring; or that the party injuring shall be punished in a certain manner.

Nay, in some cases, the law which confers or imposes the primary right or duty, and which defines the nature of the injury, is contained by implication in the law which gives the remedy, or which determines the punishment.*

And it is perfectly clear, that the law which gives the remedy or which determines the punishment, is the only one that is absolutely necessary. For the remedy or punishment, implies a foregone injury, and a foregone injury im-

* Hugo, Gesch. p. 428. Falck, p. 31.

plies that a primary right or duty has been violated. And, further, the primary right or duty owes its existence as such to the injunction or prohibition of certain acts, and to the remedy or punishment to be applied in the event of disobedience.

The essential part of every imperative law is the imperative part of it: i. e. the injunction or prohibition of some given act, and the menace of an evil in case of non-compliance.*

The reason for describing the primary right and duty apart; for describing the injury apart; and for describing the remedy or punishment apart, is the clearness which results from the separation. But it is perfectly clear that the description of any of the separate elements, is not complete without reference to the rest. I *have* no right, independently of the injunction or prohibition which declares that some given act, forbearance or omission would be a violation of my right; nor would the act or forbearance be a violation of my right, unless my right and the corresponding duty were clothed with a sanction, criminal or civil.

In strictness, my own terms, "primary and secondary rights and duties," are not correct. For a primary right or duty is not of itself a right or duty, without the secondary right or duty by which it is sustained; and *e converso*.

As I shall shew hereafter, there are some rights and duties which cannot be defined apart: in order that you may know what they are, you must look to the description of the corresponding injuries. [*E. g.*: Rights of dominion

* "But though a simply imperative law, and the punitory law attached to it, are so far distinct laws, that the former contains nothing of the latter, and the latter, in its direct tenor, contains nothing of the former; yet by *implication* (and that a necessary one) the punitory does involve and include the import of the simply imperative law to which it is appended."—Bentham, Principles, etc., p. 329.

Not so. The two branches (imperative and punitory) of the law, or rule of law, *correlate*. If the imperative branch of the law did not import the sanctioning, it would not be *imperative*, and *e converso*.—*Marginal note.*

as opposed to *servitus:* "sic utere tuo ut alienum non lædas."]

Examples of the involution of primary rights and duties, in the description of the injuries, or of the remedies or punishments.

The rights which Blackstone styles *absolute,* are by him described apart from the corresponding injuries, and from the corresponding remedies or punishments. Not so in the Institutes: There they are described implicitly, together with the corresponding injuries, in the department which relates to obligations arising from delicts. Owing to this, and to his not understanding the expression, "Law of Persons or Conditions," he has placed them with the Rights of Persons. He fancied that the Roman Lawyers had forgotten them, and that they would have placed them there if they had not.

Another instance:—the description of absolute duties is commonly involved in the description of the injuries or punishments.*

Another instance is the Prætorian Edict. As I stated in a former lecture,† the Prætor by his Edict did not formally declare that he conferred such or such rights, or imposed such or such duties. He declared that in certain cases he would give certain actions, or would give certain defences: The description of the action, involving a description of the injury, and supposing a right conferred.

In some cases, the description of the injury, and of the remedy or punishment, is annexed immediately to that of the primary right or duty.

This is the case in the Institutes, with regard to the rights and duties which arise from infringements of rights *ex contractu* and *quasi ex contractu.* In Blackstone, the rights and duties which arise directly from rights *ex contractu* and *quasi ex contractu,* are described in the second book. Those which arise from infringements of these primary rights

* See Blackstone, vol. iv. † See *ante,* p. 301.

and duties are described by themselves in the third. But in Justinian's Institutes, and in those of Gaius, the description of the rights and duties which arise from violations of primary rights, is annexed to the description of these.

By obligations *ex delicto*, the authors of the Institutes mean, obligations which arise from violations of *jura in rem*, or of *real* rights, in the sense of the modern Civilians. Hence the division of actions into actions *ex contractu* and actions *ex delicto*: Though it is manifest that the former as well as the latter must arise from delicts in the larger sense of the term. It is clear that a so-called action *ex contractu* is properly an action from a breach of a contract. Though, since the authors of the Institutes have not described the injuries, and the thence arising actions, by themselves, they are styled actions *ex contractu*.

In this respect, Blackstone's method is much superior to that of the Roman Lawyers.

[See Note 4 (C) to Table II.]

[The following Notes were found at the end of the foregoing lecture. They are written on loose sheets of paper, without any mark as to the order in which they were to follow.—*S. A.*]

Several Divisions of Law.

Primary (or sanctioned) Rights and Obligations distinguished from sanctioning:

Law has sometimes been divided into substantive law and adjective or instrumental law, *i. e.* Law which relates to Rights and Obligations; and Law which relates to the means of enforcing these rights and obligations.

Objection: Many of the rights and obligations which are included under substantive law are adjective or instrumental: as *e. g.* the powers and rights of Governors; those of Trustees.

The Rights and Obligations, therefore, which are the matter of substantive law, cannot be distinguished universally from the matter of adjective law, by their immediate end or purpose. Though most of them are rights and obligations for the enforcement of which the others exist, some of them are altogether instrumental. Though many of the rights of Governors are substantive, yet the rights which they possess in this capacity, belong to them as private persons. The powers and rights which belong to them as Governors, *ought* at least to belong to them, not for their peculiar advantage, but for that of all.

As these rights, independently of violation, cannot be classed with those which suppose violation, it is manifest that we must find some other basis for the distinction between primary and sanctioning, than this: viz: that the first are the rights and obligations to be secured, the others are merely securing. The distinction seems to be founded upon the difference of the incidents in which they directly begin. The first do not begin in violation, the second, do. I say *directly*: because (as in judgments) the second, may *end* in a fact which generates one of the first.

With reference to the final cause or ultimate purpose of law (be it exactly what it ought to be or not), rights and obligations are divisible into two sorts. Those which minister directly to that end, and those which are intended to prevent or remedy violations of the former.

Or the distinction may be expressed thus;—the first are *not* immediately enforced by the judicial power; the second are those which are *immediately* enforced.

The distinction, seems to be into Rights and Obligations which do *not* arise out of violations, and those which *do*. Amongst the former (as *e. g.* the powers of Courts of Justice), many are sanctioning. So that the division into sanctioned and sanctioning is not complete; many of those which are *sanctioned* being also *sanctioning*.

The division, therefore, (a division which applies to law

of things, and to law of persons, equally) is this: 1. Rights and Obligations which do not arise out of infractions. 2. Violations. 3. Rights, etc., which do: *i. e.* Primary (or original or civil) rights, etc., and rights, etc. ex delicto.

Rights and Obligations which it is the *end of the Law* to secure and to enforce.—Rights and Obligations which are created for the purpose of securing and enforcing the others.

This, from its simplicity is specious, but will not suffice.

Distinction between Rights, etc. *ex delicto*, and the *Procedure* (also consisting in the exercise of rights) by which they are enforced.

Distinction between Civil and Criminal. The latter might (and in fact to a great extent does) contain the former: *i. e.* In the Code of Remedies, the rights intended to be protected, with the violations of them, might be (and in fact to a great extent are) implicitly contained.

This is the case with most rights established by judicial decision; decisions being *directly* decisions upon secondary or sanctioning rights: The case also with the Prætorian edict; the Prætor only giving actions, exceptions, etc.

This is also the case with almost all obligations correlating with *Jura in re:* and with rights of personal security, etc.

Absolute Obligations are, for the most part, first announced under the description of the acts which amount to violations of them.

Reasons for separating Rights and Obligations ex delicto from the rights, whether in re or ad rem, out of violations of which they arise.

If we attach to the description of each primary Right and Obligation, the description of the rights and obligations which grow out of a breach of it, we must also attach

to it a description of the acts which are violations of it; since the conception of these must precede the conception of those. And, to be consistent, we must also tack to each right and obligation *ex delicto* a description of the process civil or criminal by which it is to be enforced.* Thus (as I have already remarked) losing the advantage of the conciseness which results from treating *together* all such violations as are *susceptible of the same description*, though they are violations of different primary rights; all such rights, etc. *ex delicto* as are susceptible of the same description, though they grow out of different delicts; and all such steps in procedure as are susceptible of the same description, although they are applicable to the enforcement of different rights and obligations *ex delicto*. The effect of this *morcellement* would be, endless repetition. It would be analogous to the rejection of generic terms.

But if to every primary right and obligation the violations of it, etc. were annexed, the extent of the right in respect of services (so far as settled) would be given in one and the same place: *i. e.* supposing that the *definitions of Rights* are implicated with the violations of them.

Scheme (in general)— "Primary Rights," "Violations," "Rights *ex delicto*," and "Procedure," to be severally considered apart. Reasons for— Reasons against— Place for absolute Obligations.

Reasons for separating Rights and Obligations ex delicto from Violations, and each from Procedure.

1st. Distinctness of conception is thereby aided. 2nd. The *generalia* of each may thereby be detached; which could not be done, if, to every particular violation, the right etc. which it generates were annexed; and to this, the particular mode of procedure by which it is asserted and enforced. 3rd. As one and the same act may be a violation of *any of a number* of primary rights, (which is a reason for considering "violations" apart from "primary

* Another reason is, that *many delicts are complex:* i.e. are violations of several distinct rights.

rights,") so one and the same Right or Obligation *ex delicto*, may result from *any of a number* of violations; and one and the same mode of procedure be applicable to *any of a number* of such secondary rights and obligations. This last advantage seems to be the second, stated in another manner.

All these parts ought to be considered as *members of one whole*, and bear a common name: whereas the plural, "Codes," would seem to oppose them.

It would seem that the definition of primary rights cannot be made complete (not even approximatively) without reference to the acts which are violations of them. *Absolute Obligations* (as not belonging to either *jura in re* or *ad rem*) cannot be considered under Primary Rights, to which they *in a certain sense* belong.

[*Jus in re (with its corresponding obligation) is passive*: i. e. it supposes no obligation on the part of anybody to do, or suffer (by personal intervention). When violated, a right of another sort, in the injured party (or a public officer) against a determinate individual, is generated.

The negative or passive nature of these obligations, may account for their not being noticed. They are merely obligations *to forbear*; and the nature of them is described, *not in conjunction with their corresponding rights*, but under the description of those violations of them (called *delicts* in the narrower sense) which generate obligations *proper*.]

Not only are the obligations which correspond with *Jura in re* established in this indirect manner; but certain of the rights themselves are nowhere described, except under the head of "*delicts*," or of the Rights and Obligations which they generate.

These are the rights which are not preceded by a *titulus*.

LECTURE XLVI.

EXCLUDING rights and duties, (which are often styled *things incorporeal*) the term "*Thing*" (in the language of the Roman law) has three different meanings.*

Taken with the most extensive sense, it embraces every object, positive or negative, which may be the subject or object of a right or duty. Taken with this extensive sense, it embraces (first) any permanent external object which may be the subject of a right or duty, and which is not a physical person, or a collection of physical persons. 2dly; It embraces persons considered as the mere subjects of rights: that is to say, considered as the subjects of rights residing in other persons, and availing against third persons. In this sense, a slave is styled a thing. 3dly; It embraces acts and forbearances considered as the objects of rights and duties: that is to say, acts which are to be done or forbearances which are to be observed agreeably to rights or duties. For example, If I am bound by contract to deliver goods, or to refrain from sending goods of a sort to this or that market, the act or forbearance to which I am bound would be styled "*res*" or "a Thing."

In a sense more circumscribed, It excludes persons, considered as subjects of rights, and includes only the following objects: 1. Permanent external objects, not being persons, and considered as subjects of rights and duties: 2. acts and forbearances as subjects of rights and duties.

In a sense which is still narrower, it excludes persons as

* See what has been already said on this subject, p. 19, *et seq.* (*ante.*)

subjects of rights and duties, it excludes acts and forbearances as objects of rights and duties, and it merely embraces such permanent external objects as fall not within the description of persons and are actual or possible subjects of rights or duties. This last is nearly the sense which is attached to the term "*thing*" in ordinary discourse or parlance. When we speak of a thing, we usually mean an object which is sensible and permanent, and which is not a person. We contradistinguish it, on the one hand, to fact or event; and we contradistinguish it, on the other, to person, *homo*, or man. Sometimes, however, we take it in a sense which is somewhat narrower. When we speak of a thing, we mean a sensible permanent object which is inanimate.

Sometimes, again, we take it in a sense so extremely extended, that it denotes any object, whether it be actual or possible, real or imaginary, which may become an object of conception, or may be made an object of discourse.

In the language of the English law, it would not appear that the term "*thing*" has any determinate import. The writers who pretend to define it, seem to limit the term to certain classes of rights, and to things properly so called. This, for instance, is the case with Blackstone, in the second chapter of his second book. But when they come to the detail, they seem to include under *things*, persons as the subjects of rights, and acts and forbearances as their objects.

For example; A slave is a chattel, and a chattel is a thing: Insomuch that a slave is a thing as comprised in the term chattel, although he is excluded (inconsistently enough) from the import of the term *thing* as explained in a general manner. Again: Blackstone in his second chapter tells us that the objects of dominion or property are *things*: and by things, he there means permanent external objects not persons. But it appears (from the rest of the second book) that he comprises in dominion or property the whole class

of rights which may be styled obligations: that is to say, rights arising directly from contracts and quasi-contracts, together with the rights to redress which arise from civil injuries. And as the objects of obligations are always acts or forbearances, it follows that he includes these in the import of the term *thing*, although he excludes them from his formal definition of them.

In short, the extension of the term *thing* is so extremely uncertain, that if it were expelled from the language of law, much confusion would be avoided. Where it has a definite meaning, it denotes such sensible objects as are subjects of rights and duties. The immediate objects of rights and duties are acts and forbearances. But in some cases, these acts and forbearances have themselves specific objects with reference to which they are to be done or exercised. *E. g.*: Right to conveyance or delivery. Right in a house or field. Right in a slave.

Sensible objects, considered as the subjects of rights and duties, might be styled *things*. Men, as invested with rights, or as bound to acts or forbearances, might be styled *persons*: And the acts or forbearances which are immediately or properly the objects of rights or duties might be distinguished from things and persons. Or the objects about which rights and duties are conversant might be distinguished into *persons*, *objects* of rights and duties, and *subjects* of rights and duties: Meaning by *persons*, men as invested with rights, or as bound to acts or forbearances: Meaning by the *objects* of rights and duties the acts to be done, and the forbearances to be observed, in pursuance of rights and duties: and meaning by the *subjects* of rights and duties, the sensible and permanent objects which are the objects of those acts and forbearances.

Having made these general remarks on the import of the term "*thing*," I will now pass in review certain divisions of things which are made in the Roman and English Law.

The distinction between things corporeal and things incorporeal I have already attempted to explain.*

In the Roman Law, things corporeal are permanent sensible objects (whether things or persons) considered as the subjects of rights and duties; and acts and forbearances considered as their objects.

Things incorporeal are rights and duties themselves.

The distinction is utterly useless; inasmuch as rights and duties, having names of their own, need not be styled "incorporeal things." And the distinction is either imperfect, or else is big with contradiction. For either forbearances are not ranked with corporeal things, in which case an object of the distinction is omitted: or they are; in which case insensible objects are ranked with sensible.

In the English Law, the same distinction obtains. It is however applied less extensively, and still more inconsistently.

Corporeal hereditaments are such immoveable things as are the subjects of certain rights. Incorporeal hereditaments are not rights generally, but rights of certain classes. The term "Chattels" is also applied in the same inconsistent manner. Chattels *real* are such rights or interests in corporeal and immoveable things as devolve to executors or administrators. Of chattels *personal* some are moveable *things* in the proper acceptation of the term, whilst others are rights: namely rights arising directly from contracts or quasi-contracts, or rights of action. As applied in some cases, the term chattel signifies a right; as applied in other cases, it signifies a thing, considered as the subject of a right.

Permanent sensible objects are divided into things moveable and things immoveable.

Physically, Moveable things are such as can be moved from the places which they presently occupy, without an essential change in their actual natures.

* See *ante*, p. 23.

Physically, Immoveable things are such as cannot be moved from their present places; or cannot be moved from their present places without an essential change in their actual natures. A field is an example of the first. A house, a growing tree, or growing corn is an example of the second.

But things which are physically moveable may be immoveable by institution. For example, an heirloom, though physically moveable, is immoveable by institution. The meaning of which is merely this: that the thing, though physically moveable, is arbitrarily annexed to an immoveable thing, so as to be considered as a part of it, and to be comprised in its name.

Sometimes the meaning is somewhat different. The moveable thing is made the subject of rights which are commonly confined to immoveables: *e. g.* Money directed to be laid out in land, and descending to the heir, is impressed with the character of land: *i. e.* descending, though not land, as land itself descends according to the English law.*

Another division of sensible permanent things is, into things determined specifically or individually, and things which are merely determined by the classes to which they belong: *e. g.* The field called Blackacre, or *a* field. This or that horse, or *a* horse. A bushel of corn, a yard of cloth, a pound of gold, a given number of guineas; or the bushel of corn contained in such a bag, or the yard of cloth, the pound of gold bearing such a mark, or the ten specific guineas now in your purse.

In the language of the Roman Lawyers, a thing individually determined is styled "*species.*" A thing which is merely determined by the class to which it belongs, is styled "*genus.*" Sometimes, *genus* signifies the class of things, and the indeterminate individual belonging to the determined class is styled "*quantitas:*" though the term *quantitas* is usually limited to such indeterminate things of determinate

* The distinction between *res mancipi* and *res nec mancipi* is somewhat analogous to this. See *post*, 473.

classes as *mensurâ, numero, vel pondere constant:* As, to *a* bushel of corn, *a* pound of gold, and so on. The thing is determined by mensuration as well as by kind, although it is not determined specifically or individually.

The terms *species* and *genus*, in the language of jurisprudence, have therefore a meaning different from that which they bear in the language of logicians. In the language of logicians, a *genus* is a larger class, and a *species* is a narrower class contained by the *genus*. As animals are a *genus*, men are a *species* of animals.

In the language of jurisprudence, *genus* denotes a *class* (whether it be a *genus* or *species* in the language of logicians), or it denotes an individual or portion not specifically determined, belonging to a determined class. Hence the expression, "specific legacy, specific performance." In the language of logicians, it would signify something totally different. A specific legacy would be a gift of an indeterminate something belonging to a determinate class.

Allied to the distinction between *species* and *genus*, or *species* and *quantitas*, is the distinction of things into fungible and not fungible.

Where a thing which is the subject of an obligation (*i. e.* which one man is bound or obliged to deliver to another) must be delivered *in specie*, the thing is not fungible: *i. e.* that very individual thing, and not another thing of the same or another class in lieu of it, must be delivered.

Where the subject of the obligation, is *a* thing of a given class, the thing is said to be fungible: *i. e.* the delivery of any object which answers to the generic description will satisfy the terms of the obligation. "In genere suo functionem recipiunt:" Meaning that the obligation is performed by the delivery of *genus* or *quantitas*. "Una fungitur vice alterius." In the language of the German jurists, fungible things are styled "*vertretbar*,"—representable. It is manifest that a thing is fungible or not with reference

to a given obligation: That anything of any class may be fungible or not: *e.g.* Do, lego *fundum*:—A bequest of *a* farm.

Fungible things have generally been confounded with things "quæ non consumuntur:" because things of that class are usually sold *in genere*. But it is manifest that a thing consumable by me may be the subject of a specific obligation; just as things not so consumable may be the subject of a generic: *e.g.* a given parcel of wine.

NOTES.

Quantitas quæ pondere aut mensurâ constat: a determinate quantity (determined, that is, by weight or measure) of an inorganic substance.

Quantitas quæ non constat:—a determined quantity (determined, that is, by the number of individuals) of organic individuals. *Any* such quantity is *individuum vagum.* An assigned quantity of the sort is *species.*

A quantity of the first sort may be resolvable into organic individuals, but organic individuals, which, for the purposes of commerce, are never considered in that character; as, *e.g.* grains of corn. *Numerus,* on the contrary, is made up of individuals, which, for the purposes of commerce, are considered as such: *i. e.* are counted; *e. g.* Sheep.—*Marginal Note in Hugo, Enc.* p. 524.

"Thing" and "Produce" are clearly relative terms. That which is produce with reference to some given subject (as, for instance, growing fruit with reference to the tree upon which it grows,) becomes a substantial or independent thing so soon as that relation ceases (*e. g.* by severance). Earth made into bricks, or fruit taken from a tree, cease to be produce or integrant parts of land, and pass into the class chattels. And again (as the bricks for instance) may, by composition, become integrant parts of another subject.—*Marginal Note in Blackstone,* iii. ch. 14.

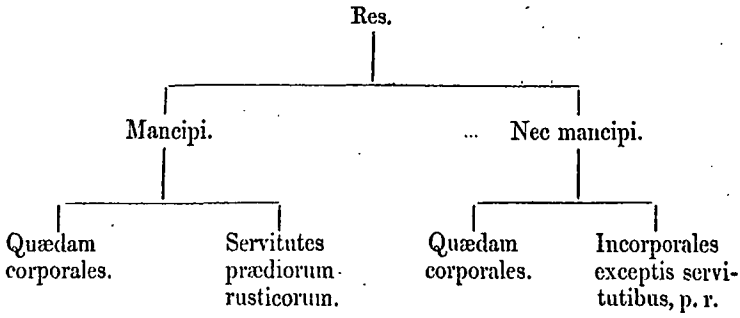
Inquirenda: How to define the subject of a Right, or, more briefly, a Thing?—What is comprised in the Subject itself? What is to be understood by its appurtenances? What is to be understood by its produce or profits? What is to be understood by the uses or services to be derived from it? By produce or profits, are we to understand periodical accretions—substances which though removed from the subject, are reproduced *in genere?* If so, how can minerals be profits or produce? and why are trees part of the inheritance? In the case of land, etc., every such object, perhaps, is comprised in the subject as has an indefinite duration and cannot be removed from it without severance.—*Marginal Note in Blackstone,* vol. ii. ch. 1.

A *university*, or *collection* of *Things*, what. Must be distinguished from a university of *Rights* or *Obligations*. A university of *Things* is not the subject of *universum jus*. It is a collection of *physical* things (whether the individual things be simple or composite); is itself a legal *individuum*; and is, therefore, not the seat of an *universitas juris*.

"Magna autem differentia est mancipi rerum et nec mancipi. Nam res nec mancipi nuda traditione abalienari possunt, si modo corporales sunt et ob id recipiunt traditionem.

Mancipi vero res sunt quæ per mancipationem ad alium transferentur," etc.—*Gaius, Lib. ii.* § 19.

The difference assigned by Gaius is a difference of properties or accidents: that is, a difference between the modes in which things of these sorts were respectively aliened or conveyed. That difference between the two classes which was the cause or source, is not even adverted to.—*Marginal Note and Table in Gaius.*



LECTURE XLVII.

Primary Rights, with primary relative duties.

HAVING indicated the leading divisions which I give to the Law of Things, (or to *the* Law *minus* the Law of Persons,) I now proceed to the first department of the latter: namely, "Primary rights, with primary *relative* duties."

Postponement of primary absolute duties.

Of the duties which I style *absolute*, (or of the duties which have no corresponding rights,) many are *primary* or *principal*, or are *not* effects or consequences of delicts or injuries. Consequently, they ought, in logical strictness, to be placed in the first department of the Law of Things. But for reasons which I hint at in my Outline, and which I shall produce in a subsequent lecture, I think it commodious to place absolute duties in that department of the Law of Things which is concerned with the rights and duties that I style sanctioning or secondary: namely, in that *sub-department* of that second department, which I give to the consideration of crimes and their various consequences.

Distribution of primary rights under four sub-departments.

In treating of primary rights, with their corresponding primary duties, I shall distribute them under four sub-departments: the ground or *rationale* of which distribution may be found in the following considerations:

It will be found on examination (as I stated in my earlier Lectures,) that every right, simple or complex, is *jus in rem*, (or a right against persons generally,) *jus in personam*, (or a right against a person or persons specifically or

individually determined,) or a combination or compound, more or less complex, of *jus in rem* and *jus in personam*.

Accordingly, I divide primary rights (including their corresponding primary duties), into the four following sub-departments. 1. Rights *in rem* as existing simply, or as not combined with rights *in personam*. 2. Rights *in personam* as existing simply, or as not combined with rights *in rem*. 3. Such combinations of *jus in rem* and *in personam* as are less complex. 4. Such more complex aggregates of *jura in rem* and *in personam* as are styled by modern civilians, *universitates juris* or universities of rights and duties.

[*v. v.* Contrast this with the method of the Roman Lawyers and of the modern civilians who follow the method of the Roman lawyers. (See Tables I. II.)

v. v. Even on my own method the inconvenience of anticipation is not avoided. (See Outline, p. xcvii.) But there is much less of it, than on the method of the Roman lawyers.]

Positive duties (or duties to do or perform) which lie upon persons generally and indeterminately.

(*v. v.*) It has been objected, by one of my hearers, that there are positive duties lying on persons generally: *e. g.* A duty, incumbent on the community generally, to pay a tax imposed by the sovereign government: Or a duty incumbent generally on persons of a certain age to render military service. But in all these cases, the duty, assuming that it lies on persons generally, is absolute. There is no determinate person, physical or complex, towards whom the duty is to be observed: or the only person, physical or complex, towards whom the duty is to be observed, is the sovereign government of the given community. And, for reasons which I have produced in my published Lectures, we cannot say with propriety of a sovereign government, that it has legal rights against its own subjects.

The division of duties into *officia* and *obligationes*, is a division of *relative* duties: *i. e.* duties incumbent on some, and answering to rights residing in others. And it appears to me, that every relative duty answers to *jus in rem* or to

jus in personam: to a right availing against persons generally, or to rights availing exclusively against persons determinate.

[*v. v.* And here I may remark, that relative duties are the only duties which are noticed in the Institutes: the reason of which is, that they are a treatise on *private law:* i. e. excluding political *status,* and criminal law.

Now absolute duties would naturally (according to this arrangement) come within the province of *public* law.]

Rights *in rem* as existing *per se,* with reference to differences between their subjects.

Treating of rights *in rem* as existing simply (or as not combined with rights in *personam,*) I will first touch upon them briefly, with reference to differences between their *subjects,* or between the aspects of the forbearances which may be styled their objects.

In relation to rights of the class, as considered from this aspect, you will find a passage in my Outline, to which I must now refer you.*

In explaining, in my earlier Lectures, the nature of the distinction between *jus in rem* and *in personam,* I cited numerous examples of rights of the former class which have no specific subjects (persons or things). And it therefore will not be necessary to adduce examples here.

With regard to *jura in rem,* which are rights over persons, I would observe that all (or nearly all of them) are matter for the Law of Persons or the Law of *Status.* Such, for example, is the case with the right of the master to the slave; the right of the master in the servant; the right or interest of the parent or husband in the child or wife; and the right or interest of the child or wife in the parent or husband. In these, and various other cases, the right is *jus in rem* (or a right availing against the world at large) of which the subject is a person. But in each of these

* See Outline, p. LXXX. *et seq.*

cases, the right is a constituent element of a *status* or condition, and therefore is appropriate matter for that appendix or supplement which is styled the Law of Persons.

The only right in or over a person which seems appropriate matter for the Law of Things, is what may be called a man's right in his own person or body: that is to say, a man's right to enjoy and dispose of (free from hindrance by others), his bodily organs and powers, in so far as such enjoyment and disposition consist with the rights of others, or (generally) with any of the duties incumbent on himself.

This right (which, as I shall show hereafter, may be likened to property or dominion in a thing, strictly so called) is properly matter for the Law of Things, or for *the* Law exclusive of the law of *status*. Instead of being parcel of a *status* or condition, it resides in every person (who has any rights at all) by the mere fact of his living under the State, or within the protection which it yields to those who are living under its jurisdiction.

I may here remark that Blackstone's division of natural rights,* should (I think) have included right of personal liberty under the head of right of personal security, or right in a man's own person. For it is merely the power of disposing of one's person consistently with the rights of others, and with duties lying on one's self. And, on the other hand, the right to reputation, which seems to have no immediate connection with a man's own person or body, ought not to have been included in the right of personal security, but ought to have been co-ordinated with it.

[*v. v.* Hence, as I explained in a former lecture, it is one of those rights which are commonly called *inborn* or *natural*, and, by Sir William Blackstone, *absolute*.]

Inborn or natural rights (or rights residing in *all* without a *special* title), would therefore fall into two kinds: namely, right to personal security, or right in one's own body, and the right to one's reputation or good name.

* Vol. I. pp. 128, 133. See Table VIII., Vol. III. (*post*).

v. v. Perhaps, however, the right to liberty is not a mere right to the enjoyment and disposition of one's person or body, but includes every right to do or forbear which is not comprehended by other specified rights. Right to liberty, what.

[Blackstone's third absolute right (the right to private property), is (as I shall show immediately), no distinct right at all.]

In treating of rights *in rem* as existing simply (or as not combined with rights *in personam*), the only rights which I shall consider directly are, rights over *things*, in the strict acceptation of the term: that is to say, such permanent external objects as are not persons. Rights *in rem* in or over persons, and rights *in rem* which have no subjects, I shall touch incidentally (in so far as I may find it necessary to advert to them), as I treat of rights of the class in or over things. Rights *in rem* over *things*, the only rights which I shall treat directly.

Of the various distinctions between rights *in rem* over things, the first to which I address myself, is the distinction which I must mark, for the present, by the ambiguous and inadequate names of *dominium* and *servitus*, or *property* and *easement*. Distinction between property or dominion, and easement or *servitus*.

I have stated in my Outline, the nature of the distinction to which I am now adverting.* In my next lecture, I shall attempt to explain it, as accurately as my time will allow. And attempting to explain that distinction, I shall proceed in the manner marked out in my Outline.†

Before I close the present lecture, I will make a few remarks upon the various meanings of the very ambiguous word "Property" or "Dominion." Various meanings of "property" or "dominion, etc."

1. Taken with its strict sense, it denotes a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of duration—over a determinate

* See Outline, p. LXXXI. † See Outline, p. LXXXIII.

thing. In this sense, it does not include *servitus*, or any right of limited duration. Sometimes it means the subject of such a right of property: *e.g.* that horse or field is my property.

2. Sometimes it is applied to a right indefinite in point of user, but limited in duration: *e.g.* A life interest in moveables.

3. It is sometimes opposed to the right of possession. In which sense, it seems to comprise *servitus*.

4. As used by the Roman lawyers, it means a right indefinite in point of user, etc., in a determinate thing or person, or it means generally *jus in rem*.* In the first sense, it stands opposed to *servitus*, and to various other rights availing against the world at large. In the second sense, it includes all the rights, to which, in the first, it stands opposed. (See Table I., Vol. III.)

5. In the English law (unless it be used in a vague and popular manner), it does not apply generally to rights in immoveables.

6. It is applied to *some* rights *in rem* over or in persons, but not to others: *e.g.* property in a slave, dominion in a slave. But neither in the Roman nor English Law, is the analogous right of the father in the son, of the husband or wife in one another, and so on, styled property or dominion.

[So of a man's right in his own person.
This is analogous to the capricious use of the term *thing* as applied to a person.]

7. "Property" is also used as meaning the aggregate of a man's faculties, rights or means—patrimony—or such as are descendible—or applicable to payment of his debts—estate and effects—assets.

8. Also, as meaning generally legal rights. This is the sense in which it is used by Blackstone in two places. At

* Mackeldey, vol. ii. p. 36.

the beginning of Vol. II. it comprises rights from contract and quasi-contract: In Vol. I., p. 138, it is nothing but a collective name for all the rights which are specified throughout his commentaries.*

Property in one's own person, etc.

Rights to personal security, reputation, freedom of locomotion, etc., may be classed with property; being *jura in re* and indefinite as to services. The right to reputation for instance, is a right to the chance of the favourable opinion and the good offices of others. There is no obligation, *stricto sensu*, to do me good; but an obligation upon others generally, to forbear from lessening the chance of deriving good from voluntary services, etc., which I possess. The subject of *this* right is neither a person nor thing.

Meanings of the terms Property and *Dominium* in the Roman Law.

With the Roman lawyers, property or *dominium* seems to mean *jus in re*, indefinite in respect of services, and unlimited in respect of duration. With them also, it was always *present* (except in the cases of usus, usufructus, emphyteusis, which were not considered as giving *dominium* to the other party, and leaving a mere reversion in the *dominus*). In the case of *fidei commissa*, the subject was said to be *in bonis* of the *fidei commissarius*.

In the English Law, Property (when not opposed to right of possession, or, perhaps, to easement; or when not used in one of the two popular ways mentioned above), seems to import unlimited duration: *jura in re* of limited duration being usually called "estates or interests." And even in this restricted sense, it is seldom applied to *jus in re* in immoveables.

It sometimes means legal rights (or the security for enjoyment, etc., which arises from the establishment of them); as when we talk of "the institution of property;" "the danger to property which would ensue from a violent change in government;" "the insecurity of property under a despotic or democratical government," etc. Property being the

* See Table VIII., Vol. III. (*post*).

most prominent of these rights, it is natural, in these cases, to extend the name to all.

With such a word, it is difficult to proceed without circumlocution.

I mean by "property," at present, any right *in rem* (especially over a thing), indefinite in point of user.

[Order of treating *jus in rem*, *jus in personam*, and their various combinations and collections.

It is rare that any incident gives birth to either alone: especially to *jus in rem*. For the sake of distinctness, however, it will be convenient to analyse the complex incidents (where that is possible) which give rise to them in combination, and to consider each part of the incident as giving origin to its appropriate right, apart from the other. Afterwards, the various combinations can be considered *seriatim*.

Inconvenience of placing combinations and collections of *jus in re* and *jus ad rem*, and especially *universitates juris* before *jura ad rem*, considered apart.

It is true that this inconvenience is in part attendant upon our own method; viz. with regard to *universitates*, which include rights and obligations *ex delicto*; but it is very much reduced. To have placed delicts before *universitates* would not have remedied the inconvenience; since some delicts are delicts by and against universal successors: whilst to separate *universitates* from *jura in re* and *jura ad rem ex contractu* and *quasi ex contractu*, of which they principally consist, would have been a greater inconvenience.]

[The following Notes, which ought to have formed part of those printed at the end of Lecture XLIII. (p. 428), were not found with them, but were afterwards discovered among other papers.—*S. A.*]

Method of the French Codes.

The Law distributed under five Codes; viz.:

Matter of the Civil Code.
Matter of the Commercial Code.
Matter of the Code of Civil Procedure.
Matter of the Penal Code.
Matter of the Code of Criminal Procedure.

Defects: Only so much of the Law of Persons as concerns domestic and quasi-domestic *Status* is comprised in the Civil Code. The law which relates to Traders (and which for reasons given above ought to enter into the Civil Code under the head of Law of Persons) is made the subject of a distinct Code, and opposed, as it were, to the law of which it is only a member. It is like dividing the human body into the right or left arm, and all such parts of it as are not right or left arm.

The administration of the law relating to traders by distinct tribunals is itself an absurdity, and not suggested by reason, but the work of blind imitation. And admitting that the separation of jurisdiction is a good, that is no reason for this mutilation. All that is peculiar to traders (tribunal, as well as other peculiarities) would, of course, in a just Corpus Juris, be contained under a distinct head; which is all that is done now; the *Code de Commerce supposing* all other parts of the Code.

The rest of the law which relates to *Status* is not in any Code or Codes at all: having never, so far as I know, been reclaimed from chaos; and being only to be found, either in the *Jurisprudence* of the tribunals, or in an immense mass of laws issued from time to time without system.

Civil Injuries are nowhere described; being merely implied in the description of the rights of which they are violations, or in

the description of the Procedure by which the Rights and Obligations which they generate are enforced. (Quære.)

Rights and Obligations *ex delicto privato* are, in the same manner, established by implication. (Quære.)

Crimes are nowhere described apart; being implicated with, and described indirectly in the Code of Punishment or that of Criminal Procedure.*

Mr. Bentham's Ideas of Method.

"*General Law and Particular Law.*"—(*Traités*, etc., vol. i. p. 150.)

Here, the purpose of the distinction into Law of Things and Law of Persons, is clearly, though briefly indicated, and well expressed: being the purpose of the very distinction between *jura rerum* and *jura personarum* which he reprobates (pp. 259, 294, 299).

Penal—Civil—Constitutional.† (See various meanings of Civil.)

Confusion of *Status* (*i. e.* the belonging to a class having peculiar rights etc.) with the being invested with rights etc. which arise out of a character that may belong to many classes: as "*Héritier, Vendeur,*" etc., "*Voleur, Séducteur,*" etc. (See *Traités*, pp. 300, 304.)

[According to this plan, *all* that relates to Contract must be repeated under every *status*.

Where a difference in the law is bottomed in some peculiarity in the subject of the right, the difference should be described under the division "Things." Quære? Whether any peculiarities of persons (as subjects of rights) should be considered under the several *Status*, or under "Things"?]—*Marginal Note.*

Idea of treating Obligations expressly and all Rights implicitly.

Confusion of that part of the Code which treats of Civil Injuries, with that which treats of Crimes.

Wherever a distinct *status* is created (whether it be domestic, special, or public), the peculiarities (whether rights, obligations,

* See p. 456 (*ante*).

† This refers to the following sentence in Bentham:—"De toutes ces divisions, celle en droit pénal, droit civil, et droit constitutionnel, est la plus complète et la plus commode."

incapacities, or exemptions) *in which it consists*, should not be mixed up with the provisions which are generally applicable. It is merely because it is expedient to treat of these peculiarities apart, that a *status* is created: *i. e.* that they are professedly treated apart.

Where the mischievous act by reason of which compensation is due from the actor to the sufferer, is not intentional or negligent, can it be called an injury or a violation of a right? Being followed by the same consequence, viz.: liability to make compensation (or restitution), it may, by analogy, be called an injury —a quasi-delict), as incidents not contracts are called quasi-contracts.]—*Traités*, etc., vol. i. p. 334, *Marginal Note*.

Distinction between civil and criminal, pp. 160, 298.

"Chaque loi civile forme un titre particulier qui doit enfin aboutir à une loi pénale."

[That is, if the obligation to repair a civil injury be considered as a punishment.]—*Traités*, vol. i. p. 161, *Marginal Note*.

The next folio is headed,

"Remarks upon Mr. Bentham's Ideas of Method;" but the rest is a blank. The nature of some of the intended "Remarks" may be gathered from the foregoing hints; and from the marginal notes extracted from the "Traités."—*S. A.*

Method of Falck.

In Falck, civil injuries are mixed up, as in the Institutes, with contracts and quasi-contracts; and (as also in the Institutes) none but violations of *jura in re* are directly described: violations of contract and quasi-contract being either left *to be deduced* from the description of the contract and quasi-contract itself, or being mixed up with actions; *i. e.* civil procedure.

The Rights and Obligations arising out of civil injuries are either annexed to the description of the violations, or are confounded with procedure.

Crimes, the obligations arising out of them, and criminal procedure, are blended together; though civil procedure is professedly treated apart from civil injuries and the rights which they beget.

Criminal Law is placed on the same line with, and opposed to, Civil Law; which is absurd for many reasons. First, to oppose (*i. e.* not merely to distinguish from, but to co-ordinate with) a peculiar *species* of violations, etc., of primary rights, to those primary rights and to *other* violations of them, etc., is absurd: Primary Rights and Obligations being opposed, not to a *species* of violations and sanctions, but to the *whole* of them.

Secondly, Civil Procedure, being by him separated from primary rights and civil injuries, etc., is thus left out of the division into Civil and Criminal. And to make it a co-ordinate class with them seems to be absurd.

"See Public and Special Law."

See Falck, *Jurist. Encyc. Einleitung*, § 21.

[The following is the passage referred to in Falck.]

"Mit Rücksicht auf die angegebenen Hauptgesichtspunkte werden sich folgende Theile ergeben.

"1. Das Privatrecht mit den Unterabtheilungen in (*a*) das bürgerliche Recht, (*b*) das Kirchenrecht, (*c*) das Polizeirecht, (*d*) das Criminalrecht, und das Prozessrecht.

"2. Das öffentliche Recht, zu welchem gehören: (*a*) das Staatsrecht, (*b*) das Regierungsrecht, (*c*) das Finanz- und Cameralrecht, und (*d*) das Völkerrecht."

[In the margin of the same page are the following remarks:—]

Law (or the Science of Law—Jurisprudence) cannot be expounded without dividing it into parts.

The division most in use is founded upon an enumeration of the several sorts of Rights; but, inasmuch as right correlates with obligation, an enumeration of the several sorts of Obligations would be just as good a basis for a division.

Both Right and Obligation (*i. e.* legal right and obligation) being creatures of Law, the notion of Law (or of a politically sanctioned Rule) ought to be placed in front (or to be made the *punctum saliens*) of a division.

The bases are substantially the same. Whether you divide Law as it relates to different subjects, or Rights (with their obligations) as they relate to those same subjects, your divisions will severally be conversant about the same sets of subjects.

A division, of which each part should exclude the subject of every other, is not possible.

Method of Hugo.

1. Opposition of Public and Private Law.
2. Inclusion of International Law in public law, and treating it with Military *Status*.
3. Inconsistency of treating Civil Injuries and Rights *ex delicto privato*, as a portion of private law; though he puts Civil Procedure, Crimes, etc., under public.
4. The making *Polizei-Recht* a distinct department of a system, into all the departments of which its matter enters.

[The portion of Hugo referred to, is the chapter called '*Theile des Rechts*,' in the *Lehrbuch der juristischen Encyclopedie*. The following comments are copied from the margin.]

Rights of Action are classed with Obligations; whilst obligations to suffer punishment, (which are not more sanctionative than the former) are referred, (together with crimes and criminal procedure) to Public Law. Civil procedure is completely separated from the Rights of Action and the matter for exception, upon which it is built. Civil Injuries are not considered directly. Sanctionative Civil Rights, which are exercised extrajudicially, are forgotten. Confusion of Crimes and their consequent obligations, are classed with Criminal Procedure.

All the other departments into which Law may be distributed, are but collections of fragments detached from the two essential ones; viz.: Law of Things or General Law, and Law of Persons, or Particular Law:

Law which is conversant with persons as *not* arranged under classes; Law which is conversant with persons as arranged under classes, or, in other words, as invested with *status* or conditions. The former is analogous to the supreme genus: the latter, to the genera and species which are contained in the supreme genus. Only analogous; because the Rights, etc., which are the subject of the former, are not *all* of them *common* to *all* classes. It is, however, analogous, inasmuch as the consideration of it is necessarily implied in the consideration of *Status*.

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